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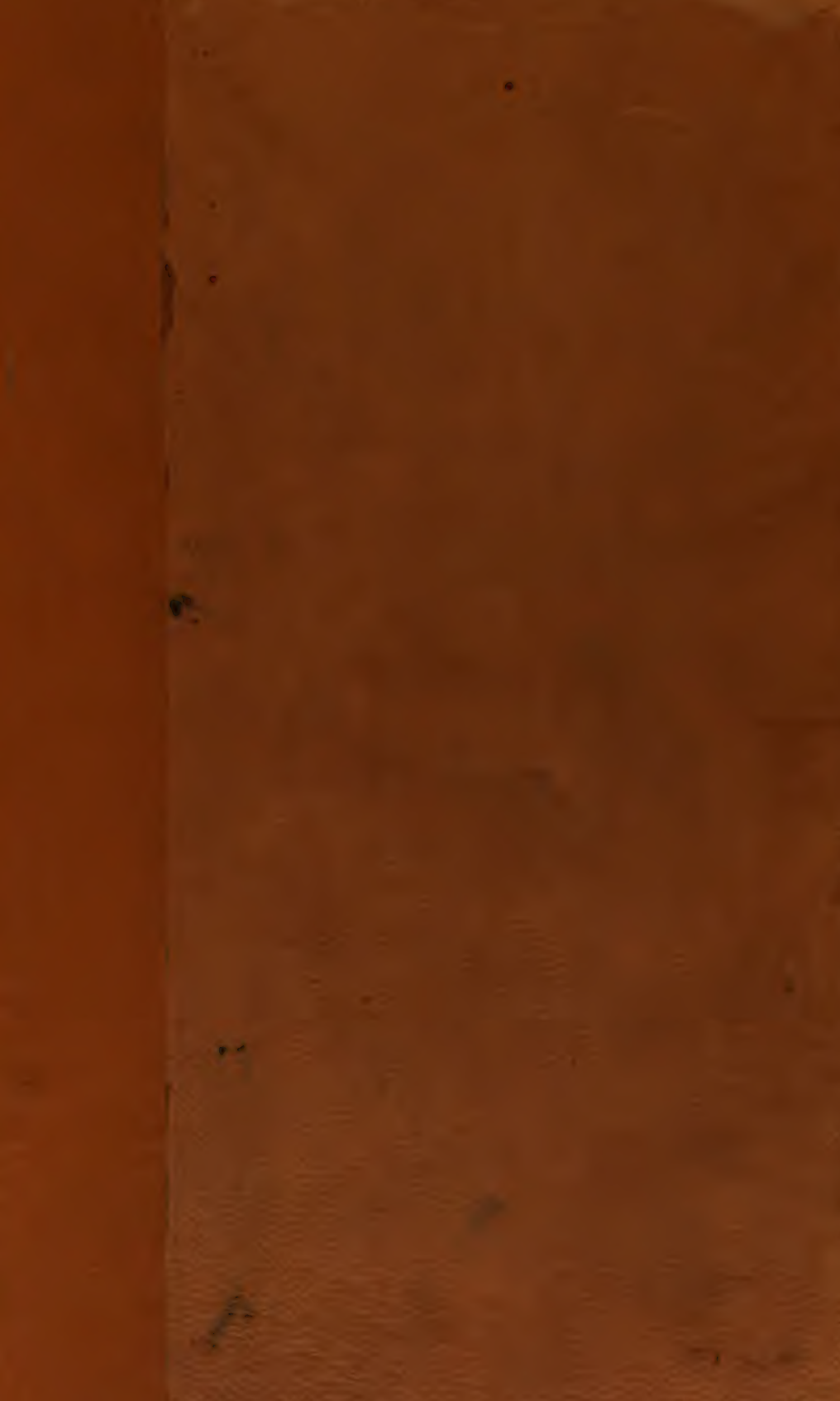
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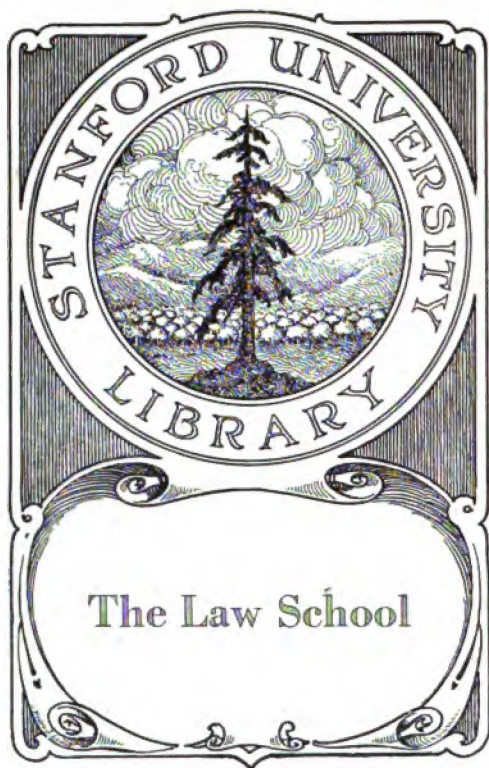
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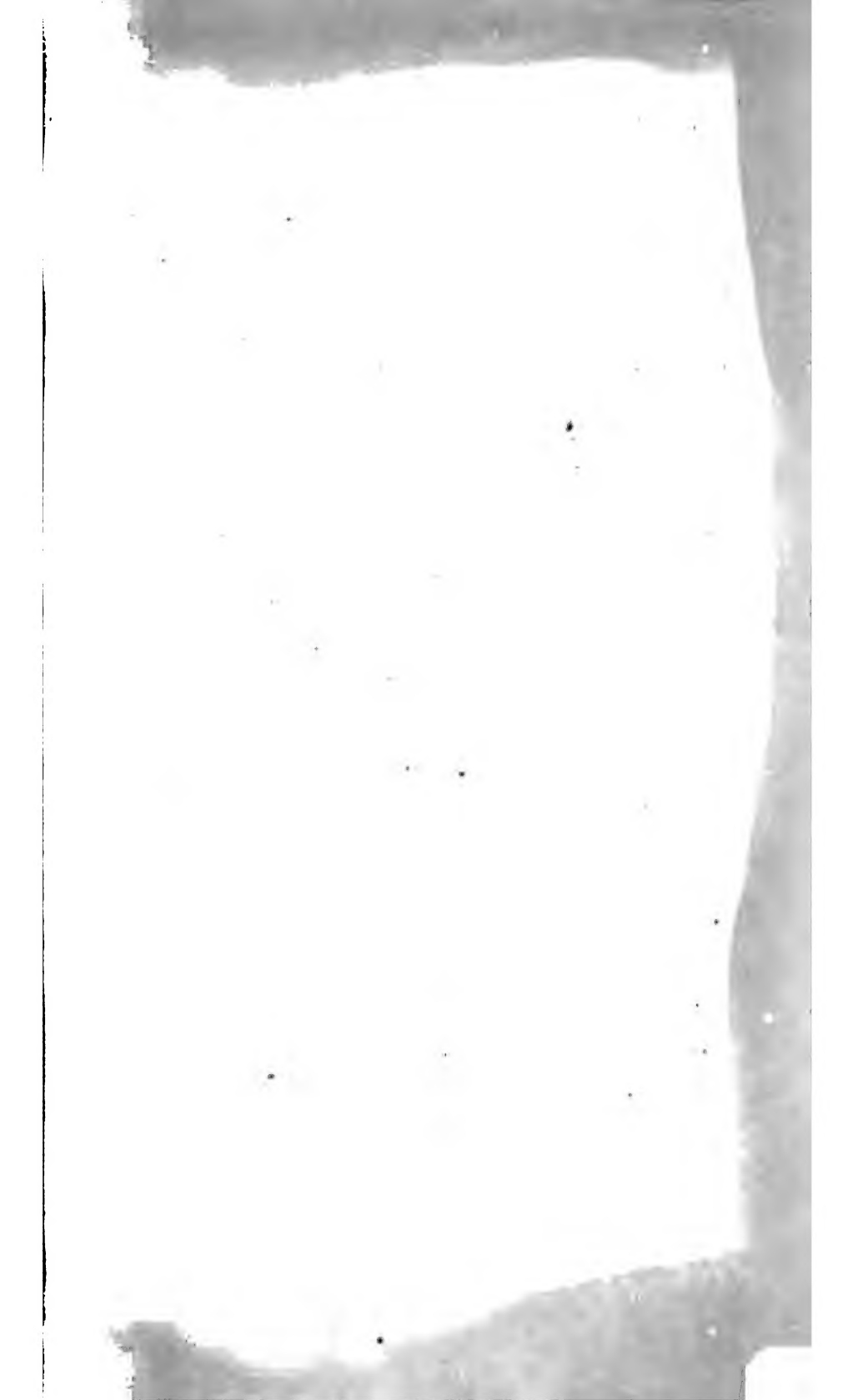
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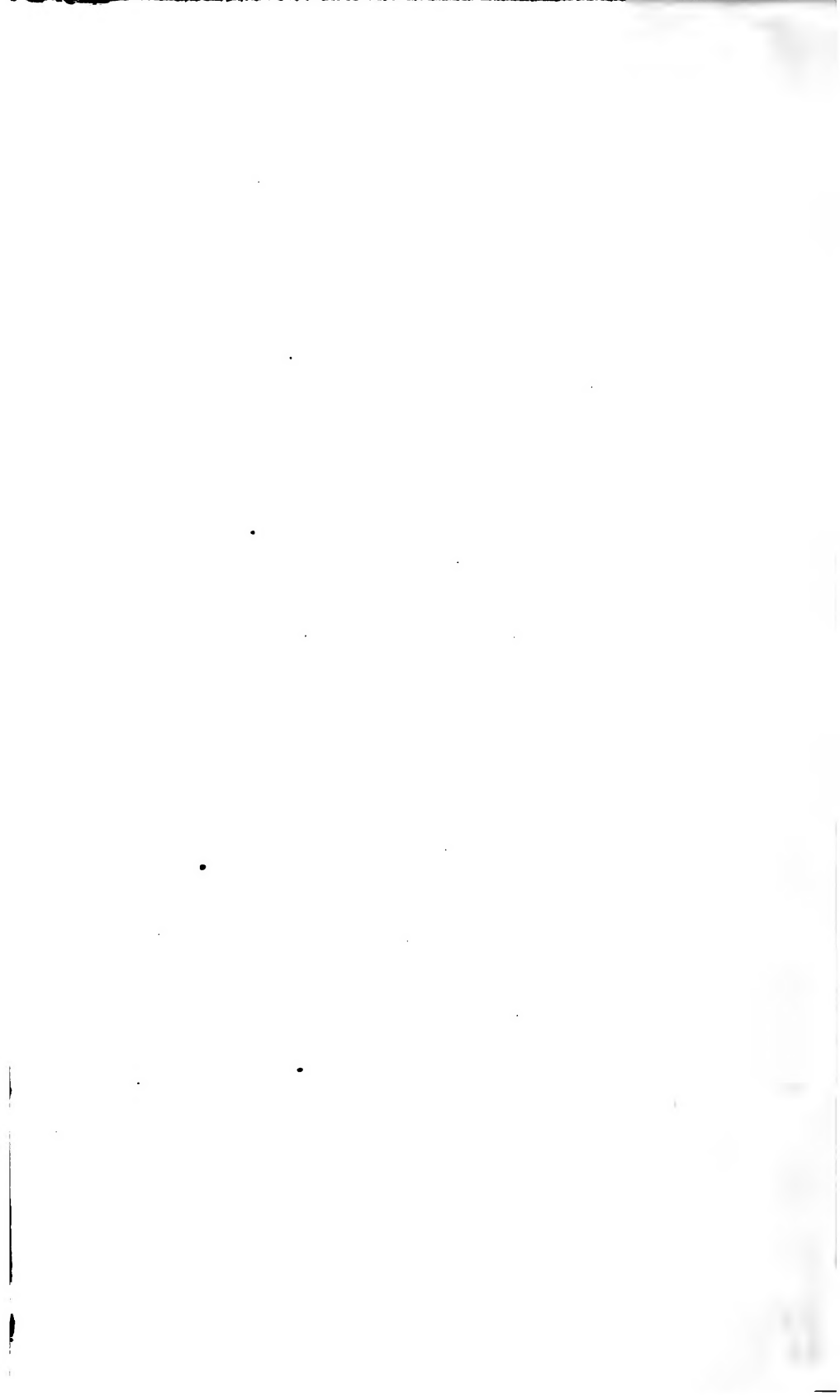
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OFFICIAL OPINIONS
OF
THE ATTORNEYS-GENERAL
OF
THE UNITED STATES,
ADVISING THE
PRESIDENT AND HEADS OF DEPARTMENTS
IN RELATION TO THEIR OFFICIAL DUTIES,
AND EXPOUNDING THE CONSTITUTION, TREATIES WITH FOREIGN
GOVERNMENTS AND WITH INDIAN TRIBES, AND
THE PUBLIC LAWS OF THE COUNTRY.

EDITED BY
A. J. BENTLEY, Esq.

VOLUME XVI.
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1881.

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VOLUME XVI.

CONTAINING

THE OPINIONS

OF

HON. CHARLES DEVENS,

OF MASSACHUSETTS.

ALSO CONTAINING OPINIONS GIVEN

BY

HON. SAMUEL F. PHILLIPS, of North Carolina,
Solicitor-General and Acting Attorney-General,

AND

HON. EDWIN B. SMITH, of Maine,
Acting Attorney-General.

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OPINIONS
OF
HON. CHARLES DEVENS, OF MASSACHUSETTS.
APPOINTED MARCH 12, 1877.

PARDON—RESTITUTION OF FINE.

M., having been convicted in a federal court of an offense against the United States, was, in April, 1876, sentenced by the court to pay a fine of \$1,000. He paid the fine, and subsequently applied for a pardon, which was granted January 27, 1877, at which time the money received in payment of the fine had not been covered into the Treasury. The pardon was a full and unconditional one, but contained no clause of restitution: *Held* that if the money paid in satisfaction of the fine has not yet been covered into the Treasury, but still remains under the control of the Executive, the same should be restored to M.

Where the pardon is full and unqualified, express words of restitution in the pardon are not needed to entitle its recipient to restitution. The right thereto results by the mere effect of such a pardon.

DEPARTMENT OF JUSTICE,
April 29, 1878.

SIR: By a communication from this Department addressed to the Secretary of the Treasury, dated February 13, 1877, written in response to a letter from Mr. Charles F. Conant, Acting Secretary, dated January 30, 1877, relative to an application made by Mr. David H. Mitchell for the refunding of a fine paid by the latter (he having received a pardon from the President for the offense for which the fine was imposed), further action upon that application was advised to be suspended until the opinion of the Supreme Court upon *Knote's case*, then pending before that court, should be declared, as it was anticipated that the general subject of the effect of a pardon touching the right of its recipient to restoration of property or money forfeited or recovered by way of punishment for the offense pardoned would receive there an authoritative discussion, which would throw light upon the particular question involved in the application.

1 A G

Pardon—Restitution of Fine.

The opinion of the Supreme Court in the case above mentioned has recently been delivered, and Mr. Mitchell, by letter dated the 22d instant, directs the attention of the Attorney-General to this fact, and asks that his application be again considered.

As this matter, under the submission to the Attorney-General made by the Acting Secretary of the Treasury, on the 30th of January, 1877, does not appear to have been finally disposed of, but seems to be still pending here, I perceive no impropriety in communicating to you my views thereon without a new submission of the matter by your Department.

I understand the facts of the case to be these: Mr. Mitchell, having been tried and convicted of an offense against the United States in the district of Kansas, was, in April, 1876, sentenced by that court to pay a fine of \$1,000. He paid the fine. Subsequently he applied for a pardon, and on the 27th of January, 1877, the President granted him a "full and unconditional pardon" for the offense, but it contained no clause of restitution. When the pardon was granted, the money received in payment of the fine had not been covered into the Treasury. At the date of the letter of the Acting Secretary, above mentioned, it remained on deposit in the First National Bank of Leavenworth, Kansas, to the credit of the Treasurer of the United States. It is presumed that the money still remains on deposit there, and has not yet been covered into the Treasury.

The inquiry arising upon the application of Mr. Mitchell is, whether, by virtue of his pardon, he is entitled to restitution of the money paid by him in satisfaction of the fine.

As was anticipated, the Supreme Court in their opinion in *Knote's case* have discussed the general subject of the effect of a pardon in regard to property or money forfeited or recovered as punishment for the offense. I extract from that opinion so much as presents the views of the court on that subject:

"The pardon," observes the court, "does not affect any rights which have vested in others directly by the execution of the judgment for the offense, or which have been acquired by others whilst that judgment was in force. If, for example, by the judgment a sale of the offender's property has been had, the purchaser will hold the property notwithstanding

Pardon—Restitution of Fine.

the subsequent pardon. And if the proceeds of the sale have been paid to a party to whom the law has assigned them, they cannot be subsequently reached and recovered by the offender. The rights of the parties have become vested and are as complete as if they were acquired in any other legal way. So, also, if the proceeds have been paid into the Treasury, the right to them has so far become vested in the United States that they can only be secured to the former owners of the property through an act of Congress. Moneys once in the Treasury can only be withdrawn by an appropriation by law. However large, therefore, may be the power of pardon possessed by the President, and however extended may be its application, there is this limit to it, as there is to all his powers: it cannot touch moneys in the Treasury of the United States, except expressly authorized by act of Congress. The Constitution places this restriction upon the pardoning power.

“Where, however, property condemned, or its proceeds, have not thus vested, but remain under control of the Executive, or of officers subject to his orders, or are in the custody of the judicial tribunals, the property will be restored or its proceeds delivered to the original owner upon his full pardon. The property and the proceeds are not considered as so absolutely vesting in third parties or in the United States as to be unaffected by the pardon until they have passed out of the jurisdiction of the officer or tribunal. The proceeds have thus passed when paid over to the individual entitled to them, in the one case, or are covered into the Treasury in the other.

“The views here expressed have been applied in practice, it is believed, by the executive departments of the Government. In 1856 the question was submitted by the Secretary of the Treasury to the Attorney-General, whether, under a pardon remitting a forfeiture to the United States, imposed by a judgment of an United States district court, the proceeds of the forfeiture deposited by the marshal in one of the public depositories to the credit of the United States, but not brought into the Treasury by a covering warrant, could be refunded to the marshal, and through him to the party entitled, in execution of the remission granted by the Presi-

Pardon—Restitution of Fine.

dent; and the Attorney-General replied that the pardoning power was completely vested in the President and did not require in its exercise any aid from Congress, nor could it be curtailed by Congress, but that if the money had actually passed into the Treasury it could not be refunded without an act of Congress, for the Constitution itself, in the provision that 'no money shall be drawn from the Treasury but in consequence of appropriations made by law', opposed an insuperable obstacle to such a proceeding, and that this provision was of equal efficiency with the pardoning power and operated as a restriction upon it. But the Attorney-General held, and so advised the Secretary, that if the money had only gone into the hands of some officer of the Government, and the right of third parties had not attached, it might be refunded."

From the doctrine thus laid down by the court—which applies as well to the proceeds of a fine or pecuniary penalty recovered of the offender in execution of a sentence, as to the proceeds of condemned property or of a forfeiture recovered by the execution of a judgment for an offense—I deduce the following:

1. That where such proceeds are under the control of the Executive, and no rights of third parties have attached thereto, they are, so long as they remain in that condition, subject to restitution by pardon.

2. That they cease to be under the control of the Executive, and are no longer subject to restitution by pardon, when they are covered into the Treasury.

3. That where the pardon is full and unqualified, no express words of restitution in the pardon are needed to entitle its recipient to restitution, since this results by the mere *effect* of such a pardon.

Governed by these principles, which accord with the views expressed by one of my predecessors (see 8 Opin., 281) as well as with those of the Supreme Court, I reach this conclusion upon the matter now under consideration: that if the money paid by Mr. Mitchell, in satisfaction of the fine, has not yet been covered into the Treasury, but still remains under the control of the Executive, he is entitled to have the same

Lotteries.

restored to him, and that, consequently, his application should be granted.

I am, sir, very respectfully,

CHAS. DEVENS.

Hon. JOHN SHERMAN,

Secretary of the Treasury.

LOTTERIES.

The Postmaster-General is not authorized, under section 3894 Rev. Stat., to direct the postmaster at New Orleans to withhold from the mails letters *suspected* to contain advertisements of lotteries.

Section 3895 Rev. Stat. does not constitute a postmaster a seizing or detaining officer of suspected letters. It confers no power to seize or to detain, but merely directs the disposition to be made of letters "seized or detained for violation of law" under other statutory provisions.

DEPARTMENT OF JUSTICE,

April 30, 1878.

SIR: Yours of 11th instant, covering a large number of documents (herewith returned) showing the Louisiana State Lottery to be using the mails, and especially the post-office in New Orleans, in the conduct of its business, and asking whether or not, under Revised Statutes, section 3894, you are authorized "to direct the postmaster at New Orleans to withhold from the mails letters *suspected* to contain advertisements of lotteries," has received careful attention. An earlier reply would have been sent but for the delay in completing their arguments on the part of the counsel of parties interested. The subject has been fully discussed by counsel for the corporation and for those objecting to its use of the mails in advertising its business. This opinion, however, will not follow the wide range of discussion allowed themselves by counsel in the accompanying briefs, but will be confined to a consideration of the question proposed by you.

For the following reasons, that inquiry is answered in the negative:

The section to which you refer says that no letter concerning lotteries shall be carried in the mail; but its concluding clause, imposing a fine upon the person depositing any such letter

Letteries.

for conveyance in the mails, indicates the means of prevention contemplated.

The next section (3895) says: "All letters, packets, or other matter which may be seized or detained for violation of law shall be returned to the owner or sender of the same, or otherwise disposed of as the Postmaster-General may direct."

This of itself confers no power of seizure nor any right of detention. It merely declares the disposition to be made of those letters which are "seized or detained for violation of law," under other statutory provisions.

Letters on which *no* postage is prepaid may be withheld from the mail by the postmaster in whose office they are deposited; and those not fully paid may be detained till such payment is made. (Revised Statutes, sections 3896 to 3900.) If the Postmaster-General is satisfied by evidence that any person is "conducting any fraudulent lottery," &c., through the mails, he may "instruct postmasters at any post-offices at which registered letters arrive directed to any such person, to return all such registered letters to the postmasters at the offices at which they were originally mailed, with the word 'fraudulent' plainly written or stamped upon the outside of such letters," which are to be returned to the writers. (Revised Statutes, section 3929.) If there are other provisions permitting a detention of letters by a postmaster, they have escaped my attention. It is believed that, at least, there are no others affecting the subject of the present inquiry. It will be seen that none of these authorize what can properly be called a "seizure" of any suspected letters by a postmaster, because, probably, he is not deemed the proper functionary to bring to trial and punishment those violating the postal laws.

The power of seizure is given to certain other Federal officers by Revised Statutes, section 3990, which says: "Any special agent of the Post-Office Department, collector or other customs officer, or United States marshal, or his deputy, may at all times seize *all letters and bags, packets or parcels, containing letters which are being carried contrary to law on board any vessel or on any post-route*, and convey the same to the nearest post-office, or may, by the direction of the Postmaster-General, or of the Secretary of the Treasury, detain them until two months after the final determination of all

Holding two Offices—Compensation.

suits and proceedings which may at any time within six months after such seizure be brought against any person for sending or carrying such letters." The next section provides for the forfeiture of the parcels in which such letters are found, and concludes by extending to any such officer making such a seizure the benefits of Title XXXIV, chap. 10.

The authorization of this course indicates to what seizures and detention section 3895 refers, and that it does not constitute the postmaster a seizing or detaining officer of suspected letters.

I am, sir, very respectfully,

CHAS. DEVENS.

Hon. D. M. KEY,

Postmaster-General.

HOLDING TWO OFFICES—COMPENSATION.

An officer who has been appointed to and is fully invested with two distinct offices may receive the compensation appropriated for each. Sections 1763, 1764, and 1765 Rev. Stat. do not apply to such a case.

DEPARTMENT OF JUSTICE, .

May 9, 1878.

SIR: In answer to your letter of the 3d instant, I have the honor to say:

Sections 1763, 1764, and 1765 of the Revised Statutes forbid any person who holds an office, the salary or annual compensation of which amounts to the sum of \$2,500, from receiving compensation for discharging the duties of any other office, unless expressly authorized by law. They also direct that no allowance or compensation shall be made to any officer or clerk by reason of the discharge of duties belonging to any other officer or clerk in the same or any other Department; and that no officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation in any form whatever, for the discharging the duties of any other office, unless expressly authorized by law. They also direct that no allowance or compensation shall be made to any officer or clerk by reason of the discharge of duties belonging to any other officer or

Holding two Offices—Compensation.

clerk in the same or any other Department; and that no officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation in any form whatever for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation.

The construction which has been given to these statutes, especially in the case of *Converse v. The United States* (21 How., 463), is that the intent and effect of them are to forbid officers holding one office from receiving compensation for the discharge of duties belonging to another, or additional pay, extra allowance, or compensation for such other services or duties when they hold the commission of but a single office, and by virtue of that office, or in addition to the duties thereof, have assigned to them the duties of another office. According to that decision, however, if an officer holds two distinct commissions, and thus two distinct offices, he may receive a salary for each. The evil intended to be guarded against by these statutes (according to this construction of them) was not so much plurality of offices as it was additional pay or compensation to an officer holding but one office for performing additional duties, or the duties properly belonging to another. If he actually holds two commissions, and does the duties of two distinct offices, he may receive the salary which has been appropriated to each office. Sections 1763, 1764, and 1765, above referred to, are condensations from statutes which were in existence at the time this decision was made, and in conformity with it. (See also 12 Opin., 459.)

In direct answer, therefore, to your inquiry, if Mr. Riley is fully invested with two distinct offices, he may receive the compensation appropriated to each, inasmuch as the two offices do not appear to be incompatible. It is for the appointing power to determine whether he can properly and fully perform the duties of the two offices.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. WILLIAM G. LE DUC,

Commissioner of Agriculture.

Certificates of Merit for Soldiers.

CERTIFICATES OF MERIT FOR SOLDIERS.

A certificate of merit cannot be issued under section 1216, Rev. Stat., to a soldier who applies for the same after his discharge. It is contemplated by that section that the applicant shall continue to be, at the time of the issuance of the certificate, a soldier of the United States.

DEPARTMENT OF JUSTICE,

May 9, 1878.

SIR: In answer to your letter of the 17th ultimo, inquiring whether a certificate of merit can be granted under section 1216 of the Revised Statutes to a soldier who applies for the same after his discharge, I have the honor to say:

The words of the section referred to contemplate, in my opinion, that the soldier at the time the certificate is granted should be then in the service of the United States. The words of this section are *in presenti*; and in considering the section in connection with section 1285, I am of opinion that it contemplates that the applicant shall continue to be at the time of the issuance of the certificate a soldier of the United States.

The section 1216 and the first clause of section 1285 are derived from the seventeenth section of the act of March 3, 1847 (9 Stat., 186). This section provides for the case of a non-commissioned officer who shall distinguish or may have distinguished himself in the service, and authorizes the President to attach him by brevet of the lowest grade of rank, with the usual pay of such grade, to any corps of the Army, and further provides that when any private soldier shall so distinguish himself the President may in like manner grant him a certificate of merit, which shall entitle him to additional pay at the rate of \$2 per month.

It is quite clear that the portion of the section which relates to non-commissioned officers cannot be executed unless they are actually in the service at the time, and when the provision in reference to the private soldier is found in the same section, and the President is directed in like manner to grant him a certificate of merit which shall entitle him to additional pay at the rate of \$2 per month, it is intended that the applicant for such certificate shall still be in the service of the United States, and that the special benefit to be derived to

Bond of Corporation Engaged in Distilling.

him from the possession of the certificate shall be the pay of \$2 a month in addition to the pay which he continues to receive from the Government.

I should be very glad in the case stated in your letter of a gallant soldier who had been severely wounded and afterwards discharged from the service, if I could reach the conclusion that he was now entitled to a certificate of merit, but I believe the result to which I come is demanded by an examination of the statutes.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. GEORGE W. McCrARY,
Secretary of War.

BOND OF CORPORATION ENGAGED IN DISTILLING.

The stockholders of a corporation engaged in the business of distilling cannot properly be accepted as sureties upon the bond required of the corporation by section 3293 Rev. Stat., even if their individual liability for the debts of the corporation is, by the terms of the charter, limited to the amount of their stock. Such stockholders being already jointly and severally liable, under the provisions of section 3251 Rev. Stat., for the taxes imposed upon the spirits manufactured by the corporation, no additional security for the payment thereof would be gained by their suretyship.

The liability imposed upon the stockholders by the internal-revenue law is a liability distinct from that which they are under as such to the public with whom the corporation deals; it is a liability imposed by reason of the business in which the corporation whereof they are stockholders is engaged.

DEPARTMENT OF JUSTICE,
May 13, 1878.

SIR: I have received your letter of the 10th instant proposing the following inquiry:

“Can stockholders in a distilling corporation, whose individual liability for the debts of the corporation is limited either by the terms of the charter or the general laws of the State, be lawfully accepted as the sole sureties upon a bond required of the corporation by section 3293 of the Revised Statutes?”

The purpose of requiring sureties upon bonds given under

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section 3293 is to provide for the United States a security additional to that which it would otherwise have; and the inquiry therefore resolves itself into this: Are the stockholders of a distilling corporation, such as you have described, jointly and severally liable under the terms of the statute for taxes imposed upon the distilled spirits manufactured by the corporation; and, if not, may they properly be received as sole sureties upon a bond required of the corporation, this responsibility in other respects being general?

If so liable, it is obvious that no additional security is gained by their suretyship upon the bonds of the corporation. It is a question to be determined rather by the laws of the United States than by the liability which the stockholders are under by virtue of the State law under which their corporation is formed. That law may properly limit their liability as stockholders to the amount of their stock, and yet if they are stockholders in a corporation engaged in the business of distilling, it is for the United States to determine what their liability shall be for the taxes or penalties which are imposed by virtue of the revenue law upon the subject of distilling.

In order to determine the liability of stockholders in such a corporation to the United States, it is necessary to refer to section 3251 of the Revised Statutes, where it is said: "*Every proprietor or possessor of, and every person in any manner interested in the use of, any still, distillery, or distilling apparatus, shall be jointly and severally liable for the taxes imposed by law on the distilled spirits produced therefrom,*" &c. In reference to this section an opinion was rendered April 23, 1876, from this Department, to the effect that the section includes stockholders of private corporations engaged in distilling, they coming within the expression "*every proprietor or possessor of, and every person in any manner interested in the use of, any still,*" &c.

The reference to those interested is sufficient to include them for the purposes of the section.

I see no reason to question the soundness of that opinion; and if it be sound, it follows that the security of the United States is in no manner increased if a stockholder is allowed to sign the bond of the corporation, as he is already, from his

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position as stockholder, liable as a person interested to the payment of the taxes.

My attention has been called to an opinion rendered by this Department on April 23, 1877, in which it was held that the word "person" as employed in chapter 4, Title XXXV, of the Revised Statutes, includes a corporation engaged in distilling spirits, so that the corporation may give the bond required by the internal-revenue law, and perform the other acts required by that law of distillers, in its corporate capacity. This opinion simply held that such construction should properly be given to the statute as to hold that artificial persons, as well as natural persons, might assume the liabilities of those engaged in distilling.

It is quite true that the private fortunes of those who hold stock in a corporation may constitute no part of its corporate property, and that the only liability which they may be under for the payment of the debts of the corporation may be liquidated by the surrender of their stock. This is an obligation, however, to the creditors of the corporation only with whom it is engaged in commercial transactions. When the United States imposes a liability upon the artificial person engaged in the business of distilling, which liability includes not merely the corporation itself but all those interested in any manner in the use of its stills, distillery, or distilling apparatus, and makes them jointly and severally liable for the taxes imposed by law, they cannot escape that liability by reason of the fact that as stockholders merely they are only liable to the creditors of the corporation to the amount of their stock. The liability imposed by the United States is a liability distinct from that which they are under as stockholders to the public with whom the corporation deals, and is a liability imposed by reason of the business in which the corporation of which they are stockholders is engaged.

I find therefore nothing inconsistent in the opinions rendered by this Department on April 23, 1876, and April 23, 1877, and that now rendered.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. JOHN SHERMAN,
Secretary of the Treasury.

Court-martial Jurisdiction.

COURT-MARTIAL JURISDICTION.

A quartermaster's clerk (*i. e.*, a civilian employed in that capacity) is not amenable to court-martial jurisdiction.

Nor are superintendents of national cemeteries, appointed under sections 4873 and 4874 Rev. Stat., amenable to such jurisdiction.

The statutes of the United States, in so far as they declare what persons or classes of persons are thereby made liable to military law and subjected to the jurisdiction of military courts, reviewed.

DEPARTMENT OF JUSTICE,

May 15, 1878.

SIR: By your letter of the 12th ultimo, inclosing a communication from the Judge-Advocate-General, dated the 10th of same month, my attention is directed to the question whether civilian clerks employed by quartermasters, and also superintendents of national cemeteries, are amenable to the jurisdiction of a court-martial, which question had some time previously been presented to me by your Department for an opinion thereon. I have now the honor to submit the following in response to that inquiry:

On the 2d of June, 1876, my predecessor, Judge Taft, gave an opinion, upon a call from the Secretary of War, dated the 5th of May, 1876, in which he held "that the clerk of a quartermaster is so employed in the military service of the United States as to be amenable to the jurisdiction of a court-martial for any violation of the sixtieth article of the Articles of War."

It would seem, however, that he subsequently contemplated a reconsideration of that opinion, for I find that on the 6th of December, 1876, a letter was addressed to him by the Secretary of War, asking his advice as to whether superintendents of national cemeteries are subject to the jurisdiction of a court-martial, in which the Secretary requests this question to be considered in connection with the question of the amenability of a quartermaster's clerk to the same jurisdiction, then "understood to be under re-examination." But nothing further having been done by Judge Taft in connection with the latter question, and he having given no opinion upon the other question mentioned up to the time of his retirement from office, a renewal of the request for an expression of the views of the Attorney-General in regard to the amenability

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to court-martial jurisdiction of both quartermaster's clerks and superintendents of national cemeteries was made by the Secretary of War on the 20th of April, 1877. I shall, in dealing with this subject, regard the opinion of my predecessor, above referred to, as if it had been pending here for reconsideration, and had not in fact been reconsidered, when his incumbency as the head of this Department terminated.

The question proposed is: Whether a quartermaster's clerk (*i. e.*, a *civilian* employed in that capacity) is amenable to court-martial jurisdiction, and whether the superintendent of a national cemetery is amenable to the same jurisdiction? In other words, are the clerk and the superintendent, or either of them, subject to the Rules and Articles of War?

In passing upon this question, it is proper to inquire at the outset whether either, or both, of the persons described therein belong to any of those classes of persons who are, by the *terms of the statutes* in force, made liable to military law; as the inclusion of an individual in some one of such classes is essential to bring him under court-martial jurisdiction.

By section 1342 of the Revised Statutes it is declared that "the *armies* of the United States shall be governed by the following rules and articles"; then follow the articles, known as the Articles of War, numbered from 1 to 128.

Section 1094 declares what "the *Army* of the United States shall consist of." There does not at present exist any military force belonging to or in the service of the United States other than that which is here described. All persons comprehended by this section are, by force of section 1342, subject to the said rules and articles.

Section 4824 subjects all persons admitted into the Soldiers' Home to the same rules and articles, "in the same manner as soldiers in the Army."

Section 4835 subjects all inmates of the National Home for Disabled Volunteer Soldiers to the same rules and articles, "in the same manner as if they were in the Army."

Section 1361 makes all prisoners under confinement in the military prison referred to therein, undergoing sentence of courts-martial, liable to trial and punishment by court-martial under the Rules and Articles of War for offenses committed during the said confinement. The next preceding section

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(sec. 1360) provides for trial by court-martial, for certain offenses, of any soldier or other person employed in the prison; but the "other person" here mentioned (as appears from section 1347) can only be an enlisted man.

These sections, namely, sections 1094, 4824, 4835, and 1361, indicate those persons who are by the existing statutes *ordinarily* amenable to trial by court-martial under the Rules and Articles of War.

In time of war or of rebellion the military jurisdiction is by section 1343 extended over *all* persons "found lurking or acting as *spies*."

Furthermore, by the sixty-third Article of War, "all retainers to the camp, and all persons serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders according to the rules and discipline of war." This provision, like that contained in section 1343, comes into play only at a particular time, namely, when the army is *in the field*; and by virtue thereof persons of that description, though not otherwise subject to military law, become for the time amenable to court-martial jurisdiction for any breach of good order, whether as affecting the discipline of the Army or the rights of individuals. (Benet, p. 29.)

But the question under consideration, as I understand it, does not relate to persons coming within the terms of the sixty-third Article of War. And it does not call for any further notice of sections 1343, 1361, 4824, and 4835. These sections, together with that article, will accordingly be passed by as unimportant in this connection.

Leaving out of view, then, the provisions just adverted to, the limits of military jurisdiction under the Rules and Articles of War, with respect to *persons*, is definitely and precisely fixed by section 1094 and the other sections which follow and supplement it declaring the constituents or components of the various branches or departments of the military establishment described therein. Persons who do not belong to that establishment, who are not a part of the Army, as thus fixed and defined, are not subject to such jurisdiction, excepting, of course, where they come within the sixty-third article, or within either of sections 1343, 1361, 4824, and 4835.

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This results from the language of section 1342, declaring that the "armies of the United States" shall be governed by the rules and articles thereafter set forth. The word "armies," here used, must be understood as now comprehending those persons, and those persons only, who compose the Army, as elsewhere defined in the statute. (See section 1094.) It is true that certain expressions in the Articles of War, descriptive of those who are punishable for offenses therein mentioned, are in themselves, abstractly considered, sufficient to comprehend other persons than the persons just referred to. Thus by the sixtieth article "any person in the military service of the United States" may be tried by court-martial for the offenses described in that article. But the words "in the military service," there used, are not to be taken in so general a sense as to include all who are employed in connection with that service in any capacity whatever. They must be construed with the provision by which the articles are preceded, and which declares that the latter shall govern "the armies of the United States." So construed, they properly include only such as belong to and serve in the Army fixed by law.

Hence the question of the amenability of an individual to court-martial jurisdiction under that article is not to be determined according to the nature of his employment—that is to say, whether it is military or not—but solely according to the circumstance of his belonging or not belonging to the military establishment as defined in section 1094, &c.

On examination, I find that neither a civilian employed as a quartermaster's clerk nor a superintendent of a national cemetery belongs to the military establishment as fixed by Congress. The Quartermaster's Department is a branch of that establishment (see section 1094), but the Quartermaster's Department is defined by section 1132, and the clerk of a quartermaster, though in its employ, is not a part of that department as there defined. Superintendents of national cemeteries are appointed under section 4873, and are by section 4874 required to be selected from meritorious and trustworthy officers or soldiers who have been honorably mustered out or discharged from the military service, but they are not within the military establishment, or impressed with a mili-

Military Academy.

tary character, or in any way made subject to the military code.

I am, therefore, of the opinion that civilian clerks employed by quartermasters and superintendents of national cemeteries are not liable to trial by court-martial under the Rules and Articles of War.

I have the honor to be, very respectfully,

CHAS. DEVENS.

Hon. GEORGE W. McCrARY,

Secretary of War.

MILITARY ACADEMY.

The professorship of the Spanish language in the Military Academy at West Point, being established by statute (section 1309 Rev. Stat.), cannot be abolished by an Executive order.

DEPARTMENT OF JUSTICE,

May 21, 1878.

SIR: Yours of the 14th instant asks my opinion upon the question "whether the Spanish professorship at West Point can be abolished by Executive order." I have considered that question, and herewith submit for your consideration an answer in the negative.

The statute of the United States referred to in the papers inclosed by you provides that *there shall be one professor and one assistant professor of the Spanish language in the Military Academy at West Point.* (Act of 1857, chap. 45; Rev. Stat., sec. 1309.)

The power of annulling a statute is itself in quality legislative. I know of no principle upon which one clause of section 1309 can be annulled that would not extend to the annulment of the whole.

Regulations by academic boards have their proper operation upon matters that have not been specifically determined by law. Inasmuch as Congress has not seen fit fully to define the course of study at West Point, there remains in that respect a considerable field for the discretion of the Academic Board. Instances of the exercise of such discretion during its past history—such as the introduction, and again the exclusion, of studies as to which the law was silent,

 Postmaster—Expiration of Term.

or the assignment and re-assignment of ratios among studies some of which were directed by law—do not justify the conclusion that studies which have been directed by the legislature may be either formally or practically disused. Such is the general character of the *instances* presented by the brief inclosed with your letter. If there be amongst them any that goes further, it must be regarded as exceptional, and not as involving a principle of so much gravity and of such extensive application to the Academy at West Point.

If you shall concur in this opinion, I recommend that the matter presented in the letter of General Schofield be brought to the attention of Congress for such action as it may deem proper.

Very respectfully, your obedient servant,
CHAS. DEVENS.

Hon. GEOEGE W. MCCREARY,
Secretary of War.

POSTMASTER—EXPIRATION OF TERM.

The term of a postmaster who is appointed by the President does not expire upon the reduction of his office by decrease of salary to one of the fourth class (vacancies in offices of which class are filled by appointment by the Postmaster-General). Such postmaster is entitled to remain in the office during the term for which he was appointed, unless sooner removed according to law.

DEPARTMENT OF JUSTICE,
May 29, 1878.

SIR: Your letter of the 14th instant incloses a copy of a communication addressed to you by the Auditor of the Treasury for the Post-Office Department, under date of the 9th instant, and inquires "whether the term of a postmaster appointed by the President expires by reason of a decrease of the amount of compensation payable to such postmaster below the sum of \$1,000, thereby rendering it the duty of the Postmaster-General to fill such vacancy."

By the act of 1872, chapter 335 (Rev. Stat., sec 3830), postmasters of the fourth and fifth classes shall be appointed and may be removed by the Postmaster-General, and all others

Postmaster—Expiration of Term.

shall be appointed and may be removed by the President by and with the advice and consent of the Senate, and shall hold office for four years unless sooner removed or suspended according to law.

By the same statute (Rev. Stat., 3852, 3853, 3854) provision is made for the compensation of the various postmasters and their division into classes, and, further, for the readjustment of their salaries by the Postmaster-General once in every two years, or in special cases oftener, if he shall deem it expedient.

At the time when the officer in question was appointed, the office was one known as a "Presidential office"—that is, one to which the President had the right to appoint; but by the readjustment of the salaries, as I understand your question, the office passed into the fourth class, and if a new appointment were to be made it should be made by virtue of the statutes by the Postmaster-General.

I am of opinion that the reduction of the office from a Presidential appointment to one where, if there were a vacancy, the Postmaster-General would appoint, does not create a vacancy in the office and thus give the Postmaster-General the power of appointment. By the terms of the commission which the postmaster received (as he was appointed by the President and confirmed by the Senate), he was to remain for the term of four years, unless sooner removed according to law. The reduction in the pay of the office cannot be construed as a removal of the incumbent, which is the only contingency contemplated by his commission which would terminate his incumbency. The office itself exists, and he is entitled to exercise its functions, by virtue of his Presidential appointment and commission, notwithstanding that by the reduction of the salaries made by the Postmaster-General in readjusting them, the office itself has passed into one of the fourth class.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. DAVID M. KEY,
Postmaster-General.

Proceedings of Naval Examining Board—chearing.

REFUND OF CUSTOMS DUTIES.

In executing the act of March 3, 1875, chap. 136, the Secretary of the Treasury is not restricted to an application of a decision of the Supreme Court to such articles only as are *specifically* embraced therein, but may properly extend his official action to all articles within the *principle* of the decision.

DEPARTMENT OF JUSTICE,
May 29, 1878.

SIR: In reply to yours of the 24th instant, referring to the decision of the Supreme Court of the United States in the recent case of *Arthur, collector, &c., v. Homer et al.*, and asking in that connection whether in executing the act of March 3, 1875 (18 Stats., 469), you are limited to an application of the above decision to such articles only as are *specifically* embraced therein, or may carry out the same in regard to all articles within *its principle*, I have to say that in my opinion you are not limited to such articles only as are specifically embraced in the above-named cases, but may properly extend your official action, as regards both the refunding of duties already paid and the reversing of rulings heretofore made in your Department, to all articles within the *principle* governing the above case, *wherever the same is plainly in point*.

It seems to me that this is a correct general rule of action under such circumstances.

Very respectfully, your obedient servant,
CHAS. DEVENS.

The SECRETARY OF THE TREASURY.

PROCEEDINGS OF NAVAL EXAMINING BOARD—REHEARING.

A naval officer having appeared before an examining board (organized and conducted under sections 1493 to 1505 Rev. Stat.), and the examination being temporarily suspended, was granted permission to go home and to be absent until notified by the board to appear. He failed to receive this notice until after the examination, which was resumed during his absence, had been concluded. The proceedings and findings of the board were approved by the President and his order in the case duly executed by the retirement of the officer (under section 1447 Rev. Stat.). But the vacancy created by such retirement

Proceedings of Naval Examining Board—Rehearing.

remains unfilled, and no rights of any other person have intervened. *Held* that the action of the President can be revoked, and the officer allowed a rehearing.

DEPARTMENT OF JUSTICE,

May 29, 1878.

SIR: Your letter of the 22d instant proposes the following inquiry:

"The proceedings and finding of an examining board (organized and conducted under sections 1493 to 1505 of the Revised Statutes) having been approved by the President of the United States, and his orders in the case duly executed by the retirement of the officer (under section 1447 of the Revised Statutes) as not recommended for promotion—and when the vacancy created by such retirement has not been filled—can the President revoke his action for the purpose of allowing the officer a rehearing?"

It appears by your statement, which accompanies the inquiry, that after the officer had appeared before the board the examination was temporarily suspended; that he was granted permission to go home, and to be absent until notified by the board to appear; that he failed to receive this notice until after the examination had been concluded and he had been retired, in consequence of which he was debarred the right of presenting material testimony in his defense.

By section 1500 of the Revised Statutes it is provided that "any officer whose case is to be acted upon by such examining board shall have the right to be present, if he so desires, and to submit a statement of his case on oath"; and by section 1503 it is provided that "no officer shall be rejected until after such public examination of himself and of the records of the Navy Department in his case, unless he fails, after having been duly notified, to appear before said board."

The statutes treat as of great importance the right of the officer to be present and submit a statement of his case to the board which examines him. It is therefore obvious that in the present case, as the officer had actually failed to be present at the time that his case was disposed of (although he received the earlier notice and was present at the first meeting of the board), he has been deprived, by the accidental circumstance of failing to receive the notice of the time at which the board

Retired Officers of the Navy.

recommenced its sessions, of a right that is deemed of great importance.

It is not necessary to consider in this case whether, if the vacancy created by his retirement had been filled, it would be possible to do him full justice. It appears that the vacancy has not been filled; that no rights of any other person have therefore intervened. All that has been done is the act of the President directing his retirement. In my opinion, this act is an act revocable by the President upon such a state of facts as that which is presented to you.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. R. W. THOMPSON,
Secretary of the Navy.

RETIRED OFFICERS OF THE NAVY.

Where a naval officer is transferred, under section 1594 Rev. Stat., from the furlough list to the retired pay list, the causes for his retirement determine the rate of pay to which he is entitled under section 1588 Rev. Stat. An officer retired on furlough pay from causes not incident to the service cannot, by the action of the Executive, be transferred to the 75 per centum retired pay list provided for by the last mentioned section.

DEPARTMENT OF JUSTICE,

May 29, 1878.

SIR: Referring to your letter of the 6th instant, which inquires, first, "whether an officer transferred, under section 1594 of the Revised Statutes, from the furlough list to the retired pay list, no particular designation of pay having been made in the nomination, can receive the higher rate of pay provided for in section 1588 of the Revised Statutes, irrespective of the conditions or circumstances of his retirement," I have to reply to this inquiry: The right to transfer from the furlough list to the retired list is undoubtedly intended to enable the Executive to exercise an act of grace, and to add to the pay of the officer upon the furlough pay list, under section 1594 of the Revised Statutes; but when the party is placed upon the retired list the terms and conditions of his retirement determine the pay which he is to receive. If the

Retired Officers of the Navy.

cause of his retirement is one of the number specified as entitling a retired officer to the payment of 75 per centum of the sea-pay, he is entitled to such payment. If the cause of his retirement is any other than those specified, he is entitled only to half the sea-pay provided.

Your letter suggests that nominations for such transfer have always been made simply in the words "furlough to the retired pay list," without any indication as to the rate of the retired pay. That form of nomination is undoubtedly correct, as when the officer is placed upon the retired list the causes for his retirement determine the rate of pay to which he is entitled. I do not find any ground for the authority suggested on the part of the Executive to designate the rate of pay which the retired officer is to receive. That must be determined by the class of officers within which he comes by reason of the cause of his retirement. Nor do I understand that it is the right of the President, with the concurrence of the Senate, to place upon the 75 per centum sea-pay list any officers excepting those who come within the class mentioned in the first clause of section 1588 of the Revised Statutes. This is a general law, and it cannot be controlled by the action of the Executive, even in concurrence with the Senate.

The second inquiry of your letter is substantially answered by that which I have already written. That inquiry is, "whether it would be lawful, under section 1594 of the Revised Statutes, to nominate an officer who had been retired on furlough pay from causes not incident to the service, for transfer to the 75 per centum retired pay list under section 1588 of the Revised Statutes, and if the officer so nominated, confirmed, and duly transferred could receive that rate of pay."

In my opinion no such nomination should be made; and if it were made and confirmed it would not be the duty of the accounting officer to pay 75 per cent. of the sea-pay to an officer thus retired.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. R. W. THOMPSON,
Secretary of the Navy.

INTERNAL-REVENUE SUITS.

The defendants in a suit on a distiller's bond, instituted for the recovery of internal-revenue taxes assessed under section 3253 Rev. Stat., have no legal right to the use at the trial of the reports, documents, and other papers on file in the office of the Commissioner of Internal Revenue, upon which the Commissioner acted in making the inquiries and determinations contemplated by section 3182 Rev. Stat., and from which he derived the information that, in whole or in part, formed the basis of the assessment. Nor has the court authority to compel the production of such papers.

DEPARTMENT OF JUSTICE,
May 31, 1878.

SIR: By your letter of the 21st instant, I am informed that in a suit upon certain distillers' bonds for the recovery of taxes upon certain assessments made against the Chicago Alcohol Works, Orlando B. Dickinson, and others, for internal-revenue taxes, now pending in the United States circuit court for the northern district of Illinois, pleas have been filed by the defendants, averring that the said assessments were fraudulently made by and through a conspiracy between D. D. Pratt, then United States Commissioner of Internal Revenue, Asa C. Mathews, then supervisor of internal revenue, and William Somerville, then United States revenue agent, and you inquire whether the "defendants, upon the trial of these suits, have any legal right to the use of the reports, documents, and other papers on file in this office upon which the Commissioner acted in making the inquiries and determinations contemplated by section 3182 of the Revised Statutes of the United States, and from which, in whole or in part, he derived the knowledge upon which he made the above-named assessments, as provided in section 3253," and whether the court has "authority to compel the production of them, or copies of them."

The pleas indicate a disposition upon the part of the defendants to change the real issue in the case, from the inquiry whether the liquors assessed as having been wrongfully removed are liable to these assessments, to an inquiry into the motives of the officers of the Government. The only inquiry proper in the case is whether such assessments were legally made. The motives of the parties in making them,

Internal-revenue Suits.

provided they acted according to law, are quite irrelevant to the issue before the court. Whether they acted on sufficient or insufficient evidence is entirely unimportant. So also it is unimportant whether they acted fraudulently or otherwise, the inquiry being simply this : Were the liquors liable to the assessments made ? which is another and distinct question of fact.

It is probable that in most cases where such assessments are made the action of the officers is based not only upon reports and written evidence, but also upon oral information, and upon their knowledge of the general facts connected with the business of the parties upon whom such assessments are laid.

I am of opinion that the defendants have no right to the production of the reports, documents, and other papers on file in the office upon which the Commissioner acted, and this for the following reasons :

First. That they have no pertinency to the inquiry whether the liquors were liable to the assessments made. If the Commissioner acted upon evidence which a jury would think insufficient in laying the assessments, it is entirely unimportant that he so acted in considering the question of whether the liquors were liable to the assessments.

Second. From the nature of the case, these documents and papers could have been in all probability only a portion of the information upon which the Commissioner acted.

Third. The reports, documents, &c., &c., are communications in their nature private, intended to affect only the judgment of the Commissioner. They could not be evidence against the parties as showing that their liquors were liable to the assessments, and they could not be evidence in their favor in showing the reverse. They are in the nature of confidential communications, intended by subordinate officers to enable a superior to perform the duty required of him by law.

For the same reasons, I am of opinion that the court can have no authority to direct the production of the papers referred to, viz, because the evidence is irrelevant to the inquiry before the court, because the papers desired may be only a portion of the information upon which the Commissioner acted, and

Retired List of the Army.

because they are of a confidential character between officers of the Government.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. JOHN SHERMAN,

Secretary of the Treasury.

RETIRED LIST OF THE ARMY.

The officers who were placed upon the retired list of the Army under the authority given by the acts of May 10, 1872, chap. 153, March 3, 1875, chap. 187, and June 26, 1876, chap. 144, are to be enumerated as a part of the three hundred to which, by section 1258 Rev. Stat., the number upon the retired list is limited.

DEPARTMENT OF JUSTICE,

June 1, 1878.

SIR: Your letter of the 27th ultimo requests my opinion upon the question whether certain officers of the Army named who were placed upon the retired list by certain special acts of Congress are to be enumerated among the officers to which by section 1258 of the Revised Statutes the retired list is limited, viz, three hundred.

The officers named are Samuel Ross, second lieutenant, retired by act of May 10, 1872, as major, N. H. McLean, lieutenant-colonel, retired as such by act of March 3, 1875, and Col. William H. Emory, retired by act of June 26, 1876, as brigadier-general.

There are no expressions in the acts relating to these officers from which it can be inferred that an addition was to be made to the retired list corresponding to their number, and the question must therefore be interpreted by the general rule which is laid down in the Revised Statutes, and the object intended to have been attained by the special acts referred to.

The general law determines the number of officers to be upon the retired list, and an examination of the acts referred to shows that they were intended to enable the President to retire the officers named, when he was either not entitled then to place them upon the retired list, or was not entitled to so place them with the rank which the act proposed to assign to them.

PARDONING POWER OF THE GOVERNOR OF DAKOTA.

In the case of Ross, he was then a second lieutenant in the Seventh Infantry, and he was by the act to be retired as a major.

In the case of Emory, he was at the time a colonel, and was by the act to be retired as a brigadier-general.

McLean was not an officer of the Army, and the act permitted him to be reinstated and retired with the rank to which he would have attained in the service at the date of the same. He was presumably an officer formerly in the service.

When distinct reasons are found in the acts why they were necessary, and those reasons have no relation to an increase of the number of officers upon the retired list, it is to be inferred that Congress intended only to enable the President to retire such officers under the circumstances, or with the rank indicated by the acts, without adding to the number of the list which had been previously fixed by a general law. In the cases referred to, undoubtedly if there had been no vacancies upon the retired list the President would have been authorized by the acts to have placed these officers upon it; but the list would only have been thus temporarily augmented, because as soon as vacancies occurred therein the general rule would apply which confined it to the number specified.

In direct answer to your inquiry, I am therefore of opinion that the officers referred to in the special acts named are to be enumerated as a part of the three hundred to which, by section 1258 of the Revised Statutes, the number is limited upon the retired list.

Very respectfully, your obedient servant,

CHAS. DEVENS.

HON. GEORGE W. MCCRARY,
Secretary of War.

PARDONING POWER OF THE GOVERNOR OF DAKOTA.

The organic act of Dakota Territory (see section 2, act of March 2, 1861, chap. 239; also section 1841 Rev. Stat.) confers upon the governor the power to pardon offenses against the laws of the Territory without any restriction or limitation whatever; and this power the Territorial legislature cannot limit or restrict, nor can its exercise by the governor be in any respect controlled thereby.

Certain provisions in the Revised Code of Dakota, 1877, namely, sections 544, 545, 547, 548, 549, and 551, considered in connection with the par-

Pardoning Power of the Governor of Dakota.

doning power of the governor, some of which (sections 544, 545, 547, and 551) are deemed objectionable as being in conflict with the organic act, while others (sections 547, 548) are regarded as unobjectionable.

DEPARTMENT OF JUSTICE,

June 3, 1878.

SIR: In answer to your communication of the 27th ultimo, inclosing a letter to yourself from the governor of Dakota Territory, and requesting my opinion, as desired by the governor, as to the validity of certain Territorial legislation affecting the governor's pardoning power, I have the honor to say:

By section 2 of the organic act of Dakota Territory (12 Stat.,* 239; Rev. Stat., sec. 1841) the pardoning power is expressly granted to the governor of the Territory with respect to offenses against the laws of the Territory without any limitation whatever.

By section 6 the legislative power of the Territorial legislature is made to extend "to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of this act."

The inquiry is whether the Territorial legislation mentioned is in conflict with the organic act.

In this act Congress has seen fit to confer upon the governor the pardoning power in respect to offenses against Territorial laws without any limitation or restriction whatsoever. In exercising this power he does not derive his authority from Territorial legislation in any respect, and as the power is not granted by the Territorial legislature it is not in the power of that body to limit it. A power to limit or restrict at discretion may be made a power to destroy; and if the Territorial legislature may withdraw certain offenses from the operation of the pardoning power it may withdraw all therefrom. If it may impose restriction, as to the mode in which the pardoning power may be exercised, it may virtually take it away altogether. The power is an executive one. The right to control it is not given to the legislature in any respect. The grant of the pardoning power of the President in the Federal Constitution (Art. 2, sec. 2) is in the same terms as are used in the organic act of Dakota in conferring the power upon the governor thereof, with this difference, that the organic act contains no exception as to cases of impeach-

Pardoning Power of the Governor of Dakota.

ment. Under this clause of the Constitution it has been decided by the United States Supreme Court that the pardoning power of the President, being granted without limitation, is not subject to legislative control. (*Ex parte Garland*, 4 Wall., 380; *United States v. Klein*, 13 Wall., 128.)

Applying these principles to the various sections of the organic act, I think there is no difficulty in determining which of them come within the rightful sphere of legislation. Those provisions which require consideration are found in the Dakota Revised Codes, 1877, page 912, sections 544, 545, 547, 548, 549, and 551, in which laws previously passed are re-enacted.

Section 544 grants the pardoning power to the governor "so far as the same is in accordance with the organic act and with the provisions of this code."

Section 545 limits the power to the granting of "reprieves, commutations, and pardons, after conviction, for all offenses except treason and cases of impeachment" * * * "subject to the regulations provided in this chapter."

Section 549 provides that before the governor can act on an application for pardon ten days' written notice of it must be served by the applicant upon the district attorney of the county where the conviction was had, and an affidavit of such service must be presented to the governor, thus imposing certain limitations upon the pardoning power and upon the method of its exercise.

By these provisions the legislature of the Territory assumes to grant the pardoning power, and it assumes to withdraw from the pardoning power certain offenses, which, if they can be committed against the Territorial law, are proper subjects for pardon, and it restricts the mode in which the governor shall exercise the power by requiring certain notices to be served. In all these respects the legislation is obnoxious and in violation of the general authority given to the governor by the organic act. His power to pardon extends to all offenses against the Territorial laws whatsoever, and he may exercise it in any mode which he deems appropriate and upon such information or notice as he may deem sufficient for the purposes of justice.

To section 548 I find no objection. This is only a requisition upon the presiding judges of the courts to furnish the

Pardoning Power of the Governor of Dakota.

governor without delay with statements of facts proved on the trial, and in no way imposes any duty upon the governor.

Nor do I think any objection exists to section 547, which simply requires the governor to annually report to the legislature such case of reprieve, commutation, and pardon; as it is a legitimate object of legislation to ascertain not only the existence and character of crimes, but the mode in which they are dealt with.

Section 551 is, however, in my opinion, in violation of the organic act. By this the governor is required to file all papers presented to him on the application for pardon in the office of the secretary of the Territory, to be kept as records open to public inspection. These papers may or may not furnish all the reasons or grounds upon which the governor granted the pardon; but, even if they do, he cannot be required to make them public. He may act in regard to the matter of pardon upon papers confidentially presented to him if he sees fit so to do. And therefore the section is in violation of the organic act in this: that it requires the governor to lay before the public some of the grounds upon which he acted in reference to the issuance of the pardon. This it is not in the power of the legislature to require. The reasons upon which he has exercised an executive power are for him to disclose or withhold, as he may deem most compatible for the public interest.

The last inquiry is as to what should be the action of the governor in regard to the exercise of his pardoning power.

Upon this I cannot properly advise. A public officer is always legally justified in disregarding an unconstitutional enactment, and in some cases it is no doubt his imperative duty to do so. Whether the law which I have discussed is or is not in violation of the organic act is a judicial question which can be determined finally only by the courts when legally put in issue before them. When an officer decides to obey or disregard a legislative act, he does so upon his own personal responsibility.

Governor Howard's letter is herewith returned.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. CARL SCHURZ,

Secretary of the Interior.

Creek Orphan Fund.

CREEK ORPHAN FUND.

Article 2 of the treaty with the Creek Indians of March 24, 1832—in providing that twenty sections of the lands therein referred to should be selected under the direction of the President for the orphan children of the Creeks, and divided and retained or sold for their benefit, as the President might direct—intended to make provision for those who were then orphan children of the Creeks, not those who might afterwards become such.

The taking of \$176,755.97 by the Indian Bureau from the accrued interest arising from investments of the proceeds of the sale of those lands, known as the Creek orphan fund, and the expending of the same by the bureau for the benefit of the loyal refugees of the Creek tribe during the years 1863 to 1865, was a diversion of the fund not authorized by the said treaty of 1832 nor by subsequent legislation.

The assent of the Creek tribes in the eleventh article of the treaty of June 14, 1846, to the diversion of the annuities which had been made from the funds of the tribe, cannot be interpreted as an assent to the diversion of the Creek orphan fund; nor has this diversion been ratified by the Creeks by any subsequent treaty.

The Department of the Interior has no authority to remedy the diversion of the Creek orphan fund by restoring the moneys. Relief can only be obtained through Congressional action.

The investment in bonds of the State of Virginia, in 1851, of the moneys belonging to the Creek orphan fund arising from the sale of bonds of the State of Alabama, was an error on the part of the President; he being then required, by section 25 of the act of September 11, 1841, chap. 25, to make such investment in stocks of the United States.

That error cannot now be remedied by the Interior Department. It is for Congress to determine whether the loss thereby occasioned is one which should be borne by the United States.

DEPARTMENT OF JUSTICE,

June 6, 1878.

SIR: Your letter of the 18th ultimo presents to me certain inquiries in relation to the fund set aside for the orphans of the Creek tribe of Indians, under the second article of the treaty of March 24, 1832.

A claim is presented by the representatives of the orphans of the Creek tribe of Indians for reimbursement of the sum of \$176,755.97, claimed by them to have been illegally diverted from the fund belonging to said orphans and to have been expended for the general benefit of the tribe; and also to restore to the Creek orphans the par value of certain stocks now held in trust by the United States for the benefit of said orphans.

Creek Orphan Fund.

The inquiries substantially are, first, whether there has been any diversion of the fund in question, and, second, whether it is in the power of the Executive Department, of which you are the head, to remedy any such diversion.

If such remedy can only be afforded by Congress, the considerations moving toward it should of course be presented to that body.

The claim grows out of the treaty made with the Creek Indians on the 24th day of March, 1832 (7 Stat., 366). By the first article of that treaty, the Creek tribe of Indians ceded to the United States all their lands east of the Mississippi River. The second article of the treaty provides for the survey and apportionment of the whole tract of land belonging to said tribe; and also that twenty sections of said land should be selected under the direction of the President for the orphan children of the Creeks and divided and retained, or sold for their benefit, as the President might direct.

An examination of the treaty shows that this article was intended to make proper provision for those who were then the orphan children of the Creeks, and was not a provision for the permanent benefit, by means of education and otherwise, of those who might afterwards become orphans of this tribe. The other articles of the treaty show that the divisions of the land were to be made between a certain number of the chiefs and the other heads of families, that annuities were to be paid to the tribe itself and certain individuals of the tribe, and that certain debts of the tribe were also to be paid by the United States; and this article was intended only to set aside a certain portion of the property for the benefit of the orphan members who were not represented through the chiefs or other heads of families.

Under the provisions of the act of March 3, 1877 (5 Stat., 186), the President did direct that said lands should be sold, and they were sold accordingly, and the proceeds, amounting to \$108,713.82, invested in interest-bearing stocks, a portion of which were those of the State of Alabama.

By the third section of the act of March 3, 1837, the President was authorized to pay to the persons entitled thereto the principal derived from the proceeds of the sale of said

Creek Orphan Fund.

lands, or to invest the whole, or any part of said principal, in interest-bearing stocks, and pay the accrued interest to the persons entitled to receive the same in such amounts and in such manner as in his opinion would be most advantageous for them.

By the fifth article of the treaty subsequently made with the Creek Indians, on August 7, 1856 (11 Stat., 700), the said Indians quit-claimed and relinquished to the United States all their right, title, and interest in and to any lands that had been owned or claimed by them, whether east or west of the Mississippi River. But, by the same article (p. 701), there was excepted from the said quit-claim, relinquishment, release, and discharge the fund created and held in trust for Creek orphans under the second article of the treaty of March 24, 1832. And it was further agreed that the right and interest of the Creek Nation and people in and to the matters so excepted should continue and remain the same as though the convention then held had never been entered into.

By the sixth article of said treaty of August 7, 1856 (p. 701), it was provided that in consideration of the said quit-claim, relinquishment, &c., a large sum of money should be paid, which sum was paid to the said Creek Nation per capita, and that certain claims should be paid and the balance, consisting of the sum of \$200,000, should be invested in interest-bearing stocks for educational purposes for the benefit of the whole Creek Nation, which sum was thus invested.

On the 10th day of July, 1861, the Creek Nation made a treaty with the so-called Confederate States whereby they ignored their allegiance to the United States. (*Vide* Preamble to treaty proclaimed August 11, 1866, 14 Stat., 785.) A large number of the Creeks, however, remained loyal to the United States, fled from the Indian Territory, and sought refuge in the State of Kansas.

By the joint resolution of February 22, 1862 (12 Stat., 614), Congress provided "that the Secretary of the Interior be authorized to pay out of the annuities payable to the Seminoles, Creeks, Choctaws, and Chickasaws, and which have not been paid in consequence of the cessation of intercourse

Creek Orphan Fund.

with those tribes, so much of the same as may be necessary, to be applied to the relief of such portions of such tribes as have remained loyal to the United States, and have been or may be driven from their homes in the Indian Territory into the State of Kansas or elsewhere."

By the acts of July 5, 1862 (12 Stat., 528), March 3, 1863 (12 Stat., 793), June 25, 1864 (13 Stat., 180), and March 3, 1865 (13 Stat., 562), being appropriation acts for the current and contingent expenses of the Indian Bureau, and for fulfilling treaty stipulations with various Indian tribes for the fiscal years ending June 30, 1863, '64, '65, and '66, provision was made that all appropriations theretofore or thereafter "made to carry into effect treaty stipulations or otherwise, in behalf of any tribe or tribes of Indians, all or any portion of whom shall be in a state of actual hostility to the Government of the United States, including the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, Wichitas, and other affiliated tribes, may and shall be suspended and postponed, wholly or in part, at and during the discretion and pleasure of the President: *Provided, further*, that the President is authorized to expend such part of the amount heretofore appropriated and not expended, and hereinbefore appropriated for the benefit of the tribes named in the preceding proviso, as he may deem necessary for the relief and support of such individual members of said tribes as have been driven from their homes and reduced to want on account of their friendship to the Government."

In said appropriation acts there was appropriated for the benefit of the Creek Indians, to pay for permanent annuities, permanent provisions, annual installments for specific objects, and annual interests provided for by treaty stipulations, the respective sums of \$49,140 (12 Stat., 515 and 516), \$49,140 (12 Stat., 778), \$40,920 (13 Stat., 165 and 166), and \$41,920 (13 Stat., 544 and 545), which amounts were expended by the Indian Bureau for the benefit of the loyal refugees of the Creek tribe during the years 1863, '64, '65, '66. During the same periods of time, there was also expended by the Indian Bureau, for the support of the said loyal refugees and for general purposes of the tribe of the Creek Nation, the sum of \$176,755.97, which was taken from the accrued interest

Creek Orphan Fund.

arising from the investments of the proceeds of the sale of lands belonging to the orphan children of the Creeks as provided for by the treaty of March 24, 1832 (7 Stat., 366), and the act of March 3, 1837 (5 Stat., 186).

The legislation referred to did not assume to direct the use of the Creek orphan fund for the benefit of loyal refugees or any other portion of the tribe, and the payments of the principal and interest of this fund were not subjects of appropriation by Congress, for it will be observed that under the provisions of the third section of the said act of March 3, 1837, the President might, at his discretion, at any time have paid the parties entitled to have received the same. The legislation, therefore, does not require us to consider whether or not it would have been competent, in view of the fact that a treaty had been concluded between the Creek Nation and the public enemies, to have confiscated this fund to the benefit of the United States, or directly condemned it to other uses than those provided by the treaty, as no such act was assumed to be done by Congress. The accrued interest of the Creek orphan fund, arising from investments made in interest bearing stocks, was drawn out of the Treasury by the Indian Bureau in the same manner as interest on trust funds is generally drawn. But the act of the Indian Bureau in devoting it to the benefit of loyal refugees of this tribe was a diversion of the fund not authorized by the original intention of the treaty, the act providing for the creation of the same, nor by the subsequent legislation during the rebellion. The acts cited, which provided for the support and maintenance of the loyal refugees of the Creek Nation during the civil war, did not undertake to condemn this fund, which belonged to certain individuals of the tribe, although they did assume to condemn the annuities, some of which were payable to the tribe and some to the individuals of the tribe.

Whether Congress would have had power to confiscate individual property by its own act without invoking the interposition and action of the courts, is not a question that arises in the present case so far as this fund is concerned. It did not assume to make such confiscation.

After the civil war was concluded, a new treaty was made, on June 14, 1866 (14 Stat., 786), by which a general amnesty

Creek Orphan Fund.

was declared for all past offenses against the laws of the United States committed by any member of the Creek Nation. By the third article of that treaty, \$100,000 in part was to be paid to soldiers and loyal refugee Indians of this tribe, who were driven from their homes by the rebel forces, to reimburse them in proportion to their respective losses. By the eleventh article of said treaty (pp. 789-790), the Creek Nation ratified and confirmed all diversion of annuities that had been made from the funds of the Creek Nation by the United States. By the twelfth article of said treaty, the United States reaffirmed and reassumed all obligations of treaty stipulations with the Creek Nation entered into before the treaty of said Creek Nation with the so-called Confederate States, July 10, 1861, not inconsistent with the provisions of said treaty of June 14, 1866, and further agreed to renew all payments of annuities accruing by force of said treaty stipulations from and after the close of the fiscal year ending June 30, 1866, except as was provided in article 11 of the said treaty of June 14, 1866. By article 14 of said treaty, it was further agreed that all treaties theretofore entered into between the United States and the Creek Nation, which were inconsistent with any of the articles or provisions of said treaty of June 14, 1866, were by said treaty rescinded and annulled.

An article was proposed to said treaty providing for the disposition to be made of the bonds in which the Creek orphan fund had been invested, which was struck out by the Senate, and which need not now be considered.

The assent, by the eleventh article of the treaty, of the Creek Nation to the diversion of the annuities which had been made from the funds of the Nation by the United States cannot be interpreted as an assent to the diversion of the Creek orphan fund; annuities having a distinct meaning in the treaty, and bearing no relation whatever to the fund in question.

The diversion of this fund to the amount of \$176,755.97, by the Indian Bureau, between the years 1862 and 1865, to the benefit of the loyal refugees of the Creek Nation was one that has not been ratified by the Creek Nation by its subsequent treaties.

I do not find any authority by which this diversion can be

Creek Orphan Fund.

remedied by the Department of the Interior by restoring the moneys. It will be for Congress to determine, upon a consideration of this legislation and the facts connected therewith, whether the sum in question should be appropriated and placed to the benefit of this fund in the Treasury.

A second inquiry arises as to the limitation of the Creek orphan fund by reason of alleged mistaken investments thereof.

A portion of the proceeds of the sale of the lands belonging to the Creek orphans, as heretofore stated, was originally invested in 1837 in bonds of the State of Alabama. On July 1, 1851, the principal and accrued interest on said bonds were exchanged for bonds of the State of Virginia. At the time the original investment was made in the stocks of the State of Alabama there was no objection to it. The President stood as a trustee for this fund, and by authority of the third section of the act of March 3, 1837, could invest the same in interest-bearing stocks as he deemed most advantageous for those who were the beneficiaries of the fund. Subsequently the act of September 11, 1841 (5 Stat., 465; Rev. Stat., sec. 3659), required investments made after that date to be in United States stocks, bearing interest at not less than 5 per cent. per annum. The bonds upon which the reinvestment was made (those of the State of Virginia) subsequently depreciated in value, and from and after the commencement of the civil war no interest has been paid on the same.

While, therefore, the original investment was authorized by the act of March 3, 1837, there was an actual investment made after the act of September 11, 1841, out of funds arising from a sale of stocks of the State of Alabama. By this action an error was undoubtedly made by the President, in investing in stocks which the law at that time prohibited an investment in.

It is to be observed that the act requiring an investment in United States stocks of the trust fund is not a portion of the treaty, nor was it in existence at the time of the treaty, but is a rule which the United States had itself laid down for the conduct of the trustee of this fund in order that the provisions of the treaty might be properly carried out.

Paymasters in the Army.

In answer to your inquiry, I am, therefore, of opinion that in making the investment of the proceeds of the sale of Indian lands (which sales were provided for by treaty stipulations) the President was required by the provisions of the second section of the Act of September 11, 1841, to make all such investments from and after that date in United States stocks bearing interest at not less than 5 per cent. per annum.

There is, however, no mode in which this error can now be remedied by the Department of the Interior; and it will be for Congress to consider whether it is just that the loss which has been occasioned by this mistake in investing the funds should be one which should fall upon the United States, or whether it is the duty of the United States to restore to the Creek orphan fund the value of the property thus invested.

In general answer to both inquiries proposed by your letter, I have to say that whatever errors may have been committed in the administration of the fund in question, to which I have called attention in the former part of my opinion, there are none which can now be remedied by Executive action.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. CARL SCHURZ,

Secretary of the Interior.

PAYMASTERS IN THE ARMY.

The compensation of a paymaster in the Army runs from the date of the acceptance of his appointment, not from the date of the approval of his bond.

The Regulations of the Army have the force and effect of law so far as they are consistent with the statutes. Those at present in force (regulations of 1863) have been adopted by the act of July 28, 1866, chap. 299, which provided (sec. 37) that the then existing regulations should remain in force until further action by Congress.

DEPARTMENT OF JUSTICE,

June 8, 1878.

SIR: Your letter of the 16th ultimo submits the question whether a bonded officer of the United States shall receive

Paymasters in the Army.

pay from the date of the acceptance of his appointment and before giving the required bond, or from the date of the approval of the bond, which question is presented for my opinion in accordance with a suggestion of the Second Comptroller of the Treasury.

I understand the inquiry to be limited to the case of paymasters in the United States Army, and I therefore so limit my reply, as there are certain bonded officers of the United States in reference to whom it is explicitly provided that they shall not receive pay until their bonds are filed and approved.

The Regulations of the Army have the force and effect of law so far as they are consistent with the statutes; and those at present in force (regulations of 1863) have been adopted by the act of July 28, 1866 (14 Stat., 332), which provided (sec. 37) that the then existing regulations should remain in force until further action by Congress.

Paragraph 1346 of the regulations of 1863 is as follows:

"Officers are entitled to pay from the date of the acceptance of their appointment, and from the date of promotion."

Paragraph 989 of the same regulations is as follows:

"All officers of the Pay, Commissary, and Quartermaster's Departments, and military storekeepers, shall, previous to their entering on the duties of their respective offices, give good and sufficient bonds to the United States fully to account for all moneys and public property which they may receive, in such sums as the Secretary of War shall direct." * * *

This paragraph is a restatement of the law contained in section 1191 of the Revised Statutes, with only verbal alterations.

The question therefore presented is whether paragraph 989 of the regulations of 1863 and section 1191 of the Revised Statutes forbid to officers of the class named (*i. e.*, paymasters in the United States Army) the right to receive pay until they have fully qualified for the duties of their respective offices by giving good and sufficient bonds, and whether any act which may be done by them previous to giving the bonds required by law and regulations can be considered as an acceptance of their appointments which would entitle them to pay.

Section 1191 of the Revised Statutes is a re-enactment of a

Paymasters in the Army.

statute first passed on the 24th of April, 1816 (3 Stat., 297), which statute has been since somewhat extended in its operation.

There are two decisions of the Supreme Court which have been made since the act of 1816 was in force that substantially dispose, as it seems to me, of the present question.

In the case of *The United States v. Bradley* (10 Pet., 343) it was held that the appointment of a paymaster in the Army was complete when made by the President and confirmed by the Senate, and that the giving of a bond for the faithful performance of his duties was a mere ministerial act for the security of the government, and not a condition precedent to his authority to act as a paymaster.

In the case of *The United States v. Linn* (15 Pet., 290), which was an action against a receiver of public moneys, it was said by Mr. Justice Thompson, upon the authority of the case of *The United States v. Bradley*, *supra*, that the "emoluments of the officer were the considerations allowed him for the execution of the duties of his office; and his appointment and commission entitled him to receive this compensation, whether he gave any security or not. His official rights and duties attached upon his appointment."

Upon the authority of these cases, I am of opinion that Major Sniffen, having expressed in distinct terms his acceptance of the duties of the office of paymaster in the Army, is entitled to pay from the date of such acceptance. Although it was his duty, as promptly as possible, to comply with the law and regulations by furnishing the required bond, which would enable him to properly discharge all the obligations of his office, yet he is not deprived of his pay for the time which intervenes between the date of the approval of his bond and that of the acceptance of his commission.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. GEORGE W. McCURRY,

Secretary of War.

Forfeiture.

FORFEITURE.

Where an act is committed by the owner of a distillery by which a forfeiture thereof is incurred under the revenue laws, and subsequently the owner conveys the property to an innocent purchaser without notice of the commission of the act, the property remains still subject to the forfeiture incurred. The conveyance, in such case, passes no title as against the United States.

DEPARTMENT OF JUSTICE,

June 8, 1878.

SIR: Referring to your communication of the 28th ultimo, I understand the inquiry proposed to be in substance this:

Assuming that certain real property—namely, a distillery—was subject to forfeiture in the ownership of a person who subsequently transfers it for value to an innocent purchaser, without notice of the wrongful act committed by the former owner, is it still subject to forfeiture?

The decision of this question, however hardly it may bear upon the innocent purchaser, rests upon well-settled principles in this branch of the law. When an act is done by which a forfeiture is incurred, the owner of the property against which it is incurred loses his right therein, and the right of the United States immediately accrues. It follows, therefore, that he has no property which he can convey; and, however innocent the purchaser may be, he takes no title by virtue of any conveyance from him.

By the case of *Henderson's Distilled Spirits* (14 Wall., 44), it will be found that this question is distinctly decided. In that case distilled spirits had been removed from the place where they were distilled with intent to defraud the United States of the tax thereon; and it was held that this act constituted a forfeiture of the spirits, and that neither the subsequent payment of the tax nor the fact that they had been sold to an innocent purchaser could exempt them from such forfeiture. Nor can any distinction be made between that case, which relates to personal property, and the present, which refers to real estate.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. JOHN SHERMAN,

Secretary of the Treasury.

Treaty of Washington—Transportation.

TREATY OF WASHINGTON—TRANSPORTATION.

Under article 30 of the Treaty of Washington, of May 8, 1871, and article 19 of the regulations made under the first-mentioned article to carry its provisions into execution, it is lawful to transport goods by means of British or American vessels from the ports of Chicago or Milwaukee to points in Canada, thence through Canadian territory by rail, and from the termini of the lines of railway by either British or American vessels to the ports of Oswego and Ogdensburgh.

The above-named ports are "ports on the northern frontier of the United States" within the meaning of said regulations.

DEPARTMENT OF JUSTICE,

June 10, 1878.

SIR: Your letter of the 15th of April last inquires as to the authority of the Treasury Department under the Treaty of Washington and the regulations made pursuant thereto. In reply, I have the honor to say:

Article 30 of said treaty provides that "subjects of Her Britannic Majesty may carry in British vessels, without payment of duty, goods, wares, or merchandise from one port or place within the territory of the United States, upon the Saint Lawrence, the Great Lakes, and the rivers connecting the same, to another port or place within the territory of the United States, as aforesaid: *Provided*, That a portion of such transportation is made through the Dominion of Canada by land carriage, and in bond, under such rules and regulations as may be agreed upon between the Government of Her Britannic Majesty and the Government of the United States."

Article 19 of the "Regulations governing the transportation of merchandise to, from, and through the British Possessions in North America under the laws and the Treaty of Washington," officially promulgated by the Secretary of the Treasury under date of March 30, 1875, provides that "goods, wares, and merchandise in transit from one port or place within the territory of the United States to another, by a route a part of which is by land carriage through the Dominion of Canada, and a part by the Great Lakes and the rivers connecting the same, or by the river Saint Lawrence, may be transported by water, in either British or American vessels, from ports on the *northern frontier* of the United States to ports on the Canadian frontier for transshipment to railway

Treaty of Washington—Transportation.

cars, and from points on the Canadian frontier, at the termini of railway transportation, to ports on the *northern frontier* of the United States in either British or American vessels."

Your letter submits the question "whether or not it is lawful to transport goods by means of British or other foreign vessels from Chicago or Milwaukee to points in Canada, thence through Canadian territory by rail, and from the termini of the lines of railway by either foreign or American vessels to Oswego and Ogdensburgh.

The regulations which the treaty contemplates shall be made are intended for the practical carrying out of the treaty, and no authority is given in any manner to limit or alter by them the terms of the treaty. They, therefore, must be construed in connection with the language of the treaty itself, and if they can be so construed as to be in conformity with the treaty, such construction is the only one admissible. The treaty itself concedes the privilege to these ports by the thirtieth article in unmistakable terms, as Lake Michigan is one of the "Great Lakes," and Chicago and Milwaukee are situated upon it.

By the same treaty (article 28) it is provided that "the navigation of Lake Michigan shall also, for the term of years mentioned in article 33 of this treaty" (which provided for the duration of the treaty), "be free and open for the purposes of commerce to the subjects of Her Britannic Majesty, subject to any laws and regulations of the United States, or of the States bordering thereon, not inconsistent with such privilege of free navigation."

Lake Michigan was thus made free to the navigation of British vessels, as the other great lakes are.

When, therefore, a provision is made by the regulations in question that the privilege of transportation, under the circumstances named, shall be given to "ports upon the *northern frontier* of the United States," and it is construed in view of the actual terms of the treaty, it must be held that Chicago and Milwaukee are properly described as "ports upon the northern frontier."

That this construction is not a forced one, but is in conformity with the use of such language in the legislation of the United States, will be seen by examining the statute of

Treaty of Washington—Transportation.

July 18, 1866 (14 Stat., p. 184, sec. 26), where it is enacted "that no goods, wares, or merchandise taken from any port or place in the United States on the *northern*, northeastern, or northwestern *frontiers* thereof to a port or place in another collection district of the United States on said frontiers in any ship or vessel, shall be unladen or delivered from such ship or vessel within the United States but in open day," &c.

By the act of February 18, 1867 (14 Stat., p. 394, chap. 42, sec. 2), it was provided "that section 26 of the act aforesaid" (that just quoted) "be so amended that the Secretary of the Treasury be, and he is hereby, authorized in his discretion to make such regulations as shall enable vessels engaged in the coasting trade between ports and places upon Lake Michigan exclusively, and laden with American productions and free merchandise only, to unlade their cargoes without previously obtaining a permit to unlade."

From the latter statute it is evident that it was considered by Congress that a description of ports upon the northern, northeastern, or northwestern frontiers of the United States included ports upon Lake Michigan. The phrase "northern frontier" is used, as it seems to me, in the regulations which we are considering, in the same sense in which it is used in the statute of 1866 above cited, which subsequent legislation indicates to have included such ports as Chicago and Milwaukee.

In direct answer, then, to the inquiry with which your letter closes, I am of opinion that it is lawful to transport goods by means of British or other foreign vessels from Chicago or Milwaukee to points in Canada, thence through Canadian territory by rail, and by either foreign or American vessels to Oswego or Ogdensburgh, and that there is no real inconsistency between the treaty and the regulations which have been adopted for the purpose of carrying into execution its provisions.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. JOHN SHERMAN,
Secretary of the Treasury.

Case of Chief Engineer Ziegler.

CASE OF CHIEF ENGINEER ZIEGLER.

On February 4, 1863, Z. was appointed a chief engineer in the volunteer naval service. In June, 1868, he was transferred to the same grade in the Regular Navy, upon nomination by the President and confirmation by the Senate, as a chief engineer therein, his commission bearing date the 18th of that month. Subsequently he applied to the Navy Department for a new commission, giving him rank in the Regular Navy from February 4, 1863 (claiming to be entitled thereto under the provisions of section 3 of the act of March 2, 1867, chap. 174), and a new commission giving him rank from that date was transmitted to him on the 23d of January, 1877. Held that section 3 of the act of March 2, 1867, did not entitle Z., on his transfer to the Regular Navy, to hold a commission as of the date of his appointment in the volunteer naval service; that the commission transmitted to him January, 1877, was improvidently issued; and that his place on the Naval Register must be determined according to the rank given him by the commission which was issued upon his nomination to and confirmation by the Senate, namely, the commission dated June 18, 1868.

The interpretation placed upon section 3 of the act of March 2, 1867, by Attorney-General Williams, in 14 Opin., 192, 358—viz, that it was designed to give the transferred officers the full benefit of their former sea-service, in so far as it might go to complete the period of such service required in their respective grades previous to nomination for promotion, and in so far as it ought properly to be taken into account in the matter of assignment to duty, and that it conferred no advantages beyond these—approved and adopted.

DEPARTMENT OF JUSTICE,

June 12, 1878.

SIR: By your communication of March 11 last, you request an opinion as to the legality of Mr. Ziegler's present position on the Navy Register, which is that of an officer whose commission purports to be dated on February 4, 1863.

The facts in the case, as they appear from a report of the naval solicitor and other papers inclosed, are substantially as follows:

Mr. Ziegler was promoted in the Volunteer Navy to the grade of chief engineer on February 4, 1863.

The act of March 2, 1867, section 3 (14 Stat., 516), provided "That the officers of the Volunteer Naval service who are, or may be, transferred to the Regular Navy or Marine Corps, shall be credited with the sea-service performed by them as volunteer officers, and shall receive all the benefits of such

Case of Chief Engineer Ziegler.

duty in the same manner as if they had been during such service in the Regular Navy or Marine Corps." * * *

In June, 1868, Mr. Ziegler was transferred from the Volunteer to the Regular Navy, and received a commission dated June 18, 1868, as chief engineer, having been nominated by the President and confirmed by the Senate.

At a subsequent date Mr. Ziegler petitioned the Navy Department to determine his place in the number and grade of chief engineers, and to do this by granting him a new commission to date back to February 4, 1863.

On the 17th of January, 1877, the Secretary of the Navy sent to the President for his signature, and he signed the same, a new commission giving Mr. Ziegler rank from February 4, 1863, according to his request, which commission was transmitted to him on the 23d of January following:

This commission was not based upon any nomination to, or confirmation by, the Senate. But it is claimed that it was a declaration and decision of the legal effect of the former commission of 1868, which was intended to give effect to section 3 of the act of 1867, and that such former commission should not have named the date thereof as of that when Mr. Ziegler's rank as chief engineer commenced in the Regular Navy.

The inquiry therefore is, whether or not the true construction of section 3 of the act of 1867 is that claimed by Mr. Ziegler—which is, substantially, that as a transferred officer he was entitled to all the credit and benefit of his volunteer service, so that he is entitled to take rank from the date of his commission as chief engineer in that service.

The inquiry, it seems to me, has been substantially settled by opinions heretofore rendered by this Department, the accuracy of which I am not disposed to question.

In the case of Lieut. Commander Dyer and others (14 Opin., 191) it is said by Hon. George H. Williams, then Attorney-General:

“As to the third section of the act of 1867, quoted above, under which the officers appointed from the volunteer service are to be credited with the sea-service performed by them as volunteer officers, and to receive all the benefits of such duty

Case of Chief Engineer Ziegler.

in the same manner as if they had been during such service in the Regular Navy, this provision does not strike me as affording any support to the view that these officers should be commissioned or take rank as from the date of the act of 1866" (which was apparently the contention in that case). "Line-officers in the Navy," the Attorney-General proceeds, "I understand, are credited with the sea-service performed by them, not so much with a view to future advancement in their relative position or rank as to future assignment to duty."

In the case of E. E. Bradbury (14 Opin., 358), Attorney-General Williams says :

"The design of the provision referred to" (speaking of that in the third section of the act of March 2, 1867), "then, was to give the transferred officers the full benefit of their former sea-service, in so far as it might go to complete the period of such service required in their respective grades previous to nomination for promotion, and in so far as it ought properly to be taken into account in the matter of assignment to duty. Beyond these advantages, the provision would seem to confer nothing."

The argument for Mr. Ziegler is substantially this : that he is entitled to all the advantages of his service in the Volunteer Navy as respects his grade and rank in the Regular Navy.

The language of the statute gives to Mr. Ziegler only the benefit of his sea-service ; and in the view taken by Attorney-General Williams (in which I concur), Mr. Ziegler derives no benefit from his service in the Volunteer Navy, except that, so far as he had performed sea-service therein, such service would be taken into account in the matter of his assignment to duty, he not belonging to the class of officers who would derive benefit in so far as it might complete the period of such service in any grade previous to nomination for promotion.

Such being my view of the construction of the act of 1867, Mr. Ziegler is not entitled to hold a commission dated as of the date of his volunteer commission ; and the commission which was transmitted to him on the 23d of January, 1877, was improvidently issued by the President and Secretary of the Navy. He should take his place upon the register according to the

 Jurisdiction of Court-Martial.

rank given him by the commission which was issued upon his nomination to and confirmation by the Senate, namely, the commission dated June 18, 1868.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. R. W. THOMPSON,
Secretary of the Navy.

 JURISDICTION OF COURT-MARTIAL.

Where a quartermaster's civilian clerk was under arrest by the military authorities, at a post in the State of Nebraska, on a charge of conspiring to defraud the government: *Held* that the accused was not subject to court-martial jurisdiction.

DEPARTMENT OF JUSTICE,
June 15, 1878.

SIR: I have the honor to return, herewith, the papers which accompanied your letter of the 21st of June, 1877, touching the case of William G. Crafts, a quartermaster's civilian clerk, who was arrested by the military authorities at Camp Robinson, in the state of Nebraska, on the charge of conspiring to defraud the government.

Your letter proposed the inquiry whether a court-martial may legally assume jurisdiction of such case.

This inquiry is covered, substantially, by the opinion which I had the honor to communicate to you under date of the 15th of May last, wherein the subject of the amenability of a quartermaster's civilian clerk to court-martial jurisdiction is considered. Accordingly, for answer thereto, I need only refer you to that opinion.

I will add that the delay in responding to your letter is the result of an oversight.

I am, sir, very respectfully,

CHAS. DEVENS.

Hon. GEORGE W. MCCRARY,
Secretary of War.

Missouri River, Fort Scott and Gulf Railroad Company.

MILITARY ACADEMY.

In the third section of the act of June 11, 1878, chap. 181, making appropriations for the support of the Military Academy, the word "hereafter" has been changed from "thereafter" by a clerical error. All changes mentioned in such section are referred to the date July 1, 1882.

DEPARTMENT OF JUSTICE,

June 28, 1878.

SIR: In reply to yours of the 27th instant, referring to the third section of the act of Congress approved June 11, 1878, entitled "An act making appropriations for the support of the Military Academy," &c., I have to say that upon consideration I am of opinion that it appears from the context of such section and otherwise that "thereafter" has been changed to "hereafter" by a clerical error, and that all the changes mentioned in such section are referred to the date July 1, 1882.

Very respectfully, your obedient servant,

S. F. PHILLIPS,

Acting Attorney-General.

The SECRETARY OF WAR.

MISSOURI RIVER, FORT SCOTT AND GULF RAILROAD COMPANY.

The mortgage to Nathaniel Thayer and others, trustees, executed by the Missouri River, Fort Scott, and Gulf Railroad Company (formerly the Kansas and Neosho Valley Railroad Company), on the 1st of January, 1869, to secure payment of bonds of the company to the amount of \$5,000,000, is a lien upon the lands granted to the State of Kansas for the company by the act of July 25, 1866, chap. 241, so far as, and no farther than, those lands were patented to it at the date of the act of March 3, 1877, chap. 125.

The trustees in the mortgage, however, having instituted proceedings in the United States circuit court for Kansas against the said company, praying for the appointment of a receiver and the foreclosure of the mortgage, the court made a decree appointing a receiver, and also a further decree, by consent of both parties to the suit, authorizing the receiver to execute and deliver to the United States a quit-claim deed for the lands conveyed by said company to the United States under the requirements of the act of March 3, 1877, chap. 125, which deed, by the terms of the decree, should release said lands from the mortgage: *Held*

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that the quit-claim deed, when executed and delivered by the receiver, will effect a valid discharge of the lien upon the said lands created by the mortgage.

DEPARTMENT OF JUSTICE,
July 1, 1878.

SIR: By your communication of the 5th ultimo, it appears that by an act of Congress approved July 25, 1866, there was granted to the State of Kansas, to aid in the construction of a railroad "from the eastern terminus of the Union Pacific Railroad, eastern division, at the line between Kansas and Missouri, at or near the mouth of Kansas River, on the south side thereof, southwardly through the eastern tier of counties in Kansas, with a view to its extension so as to effect a junction at Red River with the railroad now being constructed from Galveston to Red River, at or near Preston, in Texas," and known as the Kansas and Neosho Valley Railroad Company, "every alternate section of land, or parts thereof, designated by odd numbers, to the extent of ten sections per mile on each side of said road, to be selected within twenty miles from the line of said road" * * * "not granted, reserved, or sold, and to which the right of homestead settlements or pre-emption had not attached at the date of definite location thereof." (14 Stat., 236.)

A map showing the definite location of said road was filed in the Department of the Interior June 27, 1868, and the lands inuring to said grant on the line of the road thus established were subsequently withdrawn from settlement for the benefit of the road, viz, under dates of June 12 and October 4, 1869.

A map showing that the road had been constructed in accordance with the conditions of the granting act was filed in the General Land Office on January, 1871.

The name of said road was changed from the "Kansas and Neosho Valley Railroad" to the "Missouri River, Fort Scott and Gulf Railroad Company" by decree of the probate court of Johnson County, Kansas, on October 5, 1868.

It further appears that by an act of Congress approved March 3, 1877, entitled "An act to secure the rights of settlers upon certain railroad lands, and repeal the first five sections of an act entitled 'An act granting lands to the State of Kansas

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to aid in the construction of the Kansas and Neosho Valley Railroad and its extension to the Red River,' approved July 25, 1866," the first five sections of said act of July 25, 1866, were repealed.

By the second section of said act of March 3, 1877, the Secretary of the Interior was directed to issue no more patents to said company, and to withhold all patents not delivered.

The subsequent provisions of the latter act required the company to accept of the terms, conditions, and impositions thereof, including the reconveyance of all the lands patented to it, the repayment of all moneys received from the sale of lands, the cancellation of all outstanding contracts for the sale thereof if the contracting parties should consent in writing thereto, the repayment to purchasers of all moneys paid on outstanding contracts.

These provisions have been complied with and performed by said company within the time named, and the papers evidencing such performance are now on file in the Department of the Interior.

It also appears, however, that a mortgage was executed by the company on January 1, 1869 (after the right of the road attached to the granted lands), to Nathaniel Thayer, F. W. Palfrey, and George M. Weld, of Boston, Mass., for the sum of \$5,000,000, covering all of the lands granted to the State of Kansas for said company by the act of July 25, 1866. A copy of this mortgage accompanies your communication.

You further inform me that the company have requested a certificate that it had fully complied with the terms of said act, notwithstanding the mortgage above mentioned, and that you declined by letter of August 29, 1877, to issue such certificate until said company should procure and file a release of said mortgage so far as it related to the lands in question.

You further state that the company now claim :

First, that by reason of the prohibition contained in the last proviso of the third section of the act of July 25, 1866, said mortgage, so far as it relates to the lands included in said grant, was invalid.

Second, that said railroad company, by the terms of said mortgage, was constituted the agent of the mortgagees for the sale and disposal of said lands, and by virtue of said

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agency might release said mortgage, and by its deed reconveying said lands to the United States have released it, if it ever constituted a lien upon said lands.

Upon these facts, you request my opinion upon the following question:

“Is the mortgage executed by said company, as aforesaid, now a lien, legal or equitable, upon the lands granted to the State of Kansas for it by the act of July 25, 1866?”

In addition to the facts recited in your communication, it is understood by me that the following facts also appear:

First, that at the time the mortgage in question was executed, although the right of the road had attached to the granted lands, no patents had actually been issued, nor was such company at that time entitled to the patents, as it had not complied with the conditions upon which it was to receive them.

Second, that subsequent to that time and previous to the passage of the act of March 3, 1877, patents were issued for a considerable body of lands to the railroad company. How large¹ this quantity of lands thus patented was does not appear, nor is it here important.

Before proceeding to consider the inquiry suggested by your letter, I would state that it seems to me quite clear that although the first five sections of the act of July 25, 1866, are repealed by the act of March 3, 1877, it was not intended that any rights already secured or obtained under the former act should be affected by such repeal.

The first inquiry relates to the question of whether the execution of the mortgage would create a lien, legal or equitable, upon the whole of the lands granted to the State of Kansas for the railroad by the act of July 25, 1866, even if patents had not been issued.

In regard to that inquiry, I reply that in my opinion where patents were never issued to the lands the mortgage could not have constituted a lien, legal or equitable, upon such lands, notwithstanding the railroad company may have done all that was necessary on their part in order to entitle them to patents.

The proviso in the third section of the act of July 25, 1866, is explicit, and provides “that the said lands shall not in

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any manner be disposed of or encumbered by said company or its assigns, except as the same are patented under the provisions of this act."

Where no patents have ever issued for lands, the case in which there could be a valid disposition or encumbrance of them has never arisen. Where, however, lands have actually been patented after the execution of the mortgage, notwithstanding the proviso it seems to me that the mortgage executed previous to such patents would operate upon them, and would constitute a lien in favor of the beneficiaries of such mortgage. If at the time the railroad company assumed to convey the lands it was entitled to those lands, and to patents therefor upon the performance of certain conditions, and it afterwards actually performed the conditions and actually obtained patents for the lands, the beneficiaries of the mortgage would be entitled to the advantage of such performance and to the title derived by the issue of patents. While the railway company did not warrant the title, it assumed that it had a title to the land, and when that title was actually complete it would be estopped from contending that its conveyance was made previous to the time when it was entitled to convey.

In reference to this point, it seems to me that the law as it existed in the State of Kansas may be properly invoked. By the law of that State, if a party not having the legal title to land assumes to convey such land, and afterwards obtains the legal title thereto, the perfection of the title of the grantor inures to the benefit of the grantee. (*Vide* sec. 5, chap. 22, Gen. Stat. of 1868.)

The proviso which we are considering must be treated as one intended for the benefit of the United States, and when they have ceased to have any interest in the matter by reason of the completion of the title of the railroad company to the lands by the issue of patents, it could not operate to defeat a title which the railroad company assumed to convey.

By one of your inquiries it is suggested that by the terms of the mortgage itself the trustees under that mortgage may have a right to now convey a full title even in the patented lands to the United States.

This mortgage is in the form of an indenture between the

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railroad company and the trustees named therein, and its object was to provide a fund for the payment of the bonds which were secured thereby. It was provided that the railroad company should establish an office for the sale of the lands, and should execute deeds of conveyance for any part of said lands, which deeds were only to be made when the whole purchase price agreed upon should be paid for the same. A careful provision was made for the form in which the purchase money should be paid. In order to enable purchasers to be sure of their titles, it was provided that the conveyance of the land should not be impeded or restricted, and that the railroad company should be so far the agent of the trustees that the deed of the company duly executed should operate as a release of the tract of land so sold from the operation and effect of the indenture, the railroad company agreeing in its turn that all the money realized upon any contracts of sale should be appropriated for the purpose of providing for the payment of the bonds by depositing the same in a sinking fund in the hands of the trustees for that purpose.

While it is undoubtedly an unusual provision that the mortgagors should be entitled to make conveyance of the lands mortgaged, and to act as agent of the mortgagees in the receipt of moneys for the same, yet it cannot be considered that by the existence of such a provision the mortgagors are entitled to devote the sum received to their own uses independently of the rights of the bondholders, or that they are entitled to convey the lands for their own benefit either by reconveyance to the United States or by conveyance to any third party. No such construction can properly be given to this provision of the mortgage which would entitle the railroad company to deprive the bondholders of the benefit of the security which the mortgage was intended to give.

In direct answer to your inquiry, I would then reply that the mortgage executed by said company as aforesaid is a lien, legal or equitable, upon the lands granted to the State of Kansas for it by the act of July 25, 1866, so far as, and no further than, those lands were patented to it at the date of the act of March 3, 1877.

Since your inquiry was submitted, and while the papers

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have been in my hands, there has been laid before me a copy of certain proceedings alleged to have taken place in the United States circuit court for Kansas by which it is argued that it will now be in the power of the railroad company, through its receiver, to reinvest the United States with its title by a legal discharge of the mortgage. These papers are apparently complete and are properly authenticated; and I therefore proceed to consider the inquiry whether a sufficient discharge of this mortgage can now be made, assuming it to have been originally valid, as this is a question which the parties in interest have desired now to present.

The papers referred to are a copy of a bill in equity, brought in the United States circuit court for Kansas by the trustees of the mortgage against the railroad company, praying the appointment of a receiver and for the foreclosure of the mortgage in question. There is also a copy of a decree appointing a receiver, and of a further decree made by the court upon the original petition, by which it is ordered, by consent of both parties to the action, that the receiver may execute and deliver to the United States a quit-claim deed for the lands conveyed by the defendant railroad company to said United States, being all the unsold portion of the lands it acquired by its Congressional grant, and deposit the same with the Secretary of the Interior, which said deed (according to the decree) should complete the conveyance of said lands to the United States freed and released from any effects whatsoever of the mortgage above referred to.

The above order having been regularly issued by consent of both parties in the United States circuit court for Kansas (which, it seems to me, had jurisdiction of the matter), and both parties, or their legal representatives, having properly appeared in the case, I am of opinion that the effect of such proceedings would be to enable the receiver thus appointed to execute and deliver a quit-claim deed to the United States which would release the lien created by the mortgage which had theretofore been executed by said company, and the validity of which as a lien to a certain extent I have heretofore recognized in the earlier part of this opinion.

In addition to the papers sent by you, I forward herewith the authenticated copies of the proceedings in the United

Relative Rank of Assistant Surgeons.

States circuit court of Kansas, referred to in the latter part of this opinion, together with the proposed deed of the receiver, which appears to me to be in conformity with the authority given by the decree.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. CARL SCHURZ,

Secretary of the Interior.

RELATIVE RANK OF ASSISTANT SURGEONS.

Opinion of June 6, 1878, in the case of Dr. Archibald B. Campbell, assistant surgeon, referred to, and *held*, further, in same case: (1) That C., who entered the service as assistant surgeon with the rank of captain October 14, 1867, ranks W., who was appointed assistant surgeon and first lieutenant May 14, 1867, and captain May 31, 1870. (2) That under the act of July 28, 1866, chap. 299, an assistant surgeon with the rank of captain takes precedence of every assistant surgeon with rank of captain of later date, and of every assistant surgeon with the rank of first lieutenant, without reference to the date of their entry into service as assistant surgeons.

DEPARTMENT OF JUSTICE,

July 2, 1878.

SIR: Applying the principle laid down in the case of Dr. Archibald B. Campbell in the opinion given to you by the Attorney-General upon the 6th ultimo to the questions asked in the same connection in yours of to-day, I beg to say:

1. Dr. Campbell is entitled to precedence over all captains of later rank in the medical corps, notwithstanding the latter may have been appointed assistant surgeons in the Regular Army with the rank of first lieutenant before Dr. Campbell entered the same service with his present commission, *i. e.*, adopting the names and dates which you present, Dr. Robert H. White, who was appointed assistant surgeon and first lieutenant 14th of May, 1867, and captain 31st of May, 1870, is "ranked" by Dr. Campbell, who entered the service in his present commission as assistant surgeon with the rank of captain 14th of October, 1867.

2. Referring to alternative language used by you in the same connection, under the act of 1866, chap. 299, sec. 17, an

Departmental Printing and Binding.

assistant surgeon with the rank of captain takes precedence of every assistant surgeon with rank of captain of later date, and of every assistant surgeon with the rank of first lieutenant, without reference merely to the date of their entry into service as assistant surgeons.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Acting Attorney-General.

The SECRETARY OF WAR.

DEPARTMENTAL PRINTING AND BINDING.

The provision in the sundry civil act of June 20, 1878, chap. 359, that "no books shall be printed and bound except when the same shall be ordered by Congress or are authorized by law," operates to prohibit the practice which theretofore existed (under *implied* authority of law) of printing and binding reports, &c., made in the course of Departmental business, and requires that thenceforth, for such printing and binding, there must be express statutory authorization.

DEPARTMENT OF JUSTICE,

July 2, 1878.

SIR: Yours of the 29th ultimo, addressed to the Attorney-General, asking for an opinion upon a clause contained in the sundry civil act passed at the late session of Congress, has been received, and herewith I submit for your consideration a reply.

The clause in question is as follows: "And hereafter no binding shall be done for any Department of the Government except in plain sheep or cloth, and no books shall be printed and bound except when the same shall be ordered by Congress or are authorized by law."

If the above phrase, "authorized by law," be treated as referring either (1) to future law only or (2) to law *in general*, the previous prohibition becomes either (1) superfluous or (2) nugatory; for, under the former hypothesis, in the absence of that phrase the prohibition would be subject all the same and equally to all future legislation, and under the latter the exception would be as wide as the command, and would leave things just as they were before.

Eight-hour Law.

Such interpretation must therefore be rejected. The proper solution, as I apprehend, is to be found in some modified sense of the word *law* in the phrase above quoted. It has been the practice, I understand, to consider heads of Departments vested *impliedly* with authority of law to print and bind whatever reports, &c., are made in the course of Departmental business. I interpret the above prohibition as operating upon this practice, and requiring hereafter for such printing and binding express statutory authorization.

That which is spoken of is "printing and binding"; not *printing* alone or *binding* alone, although of course the prohibition extends to such operations in future, whether ordered at once or successively.

Presuming that what I have said above is substantially a full reply to your communication, I shall not refer more particularly to its details.

Very respectfully,

S. F. PHILLIPS,
Acting Attorney-General.

The SECRETARY OF THE NAVY.

EIGHT-HOUR LAW.

The circular of the Navy Department of March 21, 1878, announcing that "the Department will contract for the labor of mechanics, foremen, leading-men, and laborers on the basis of *eight* hours a day," but that all workmen "electing to labor ten hours a day will receive a proportionate increase of their wages," is in accordance with section 3738 Rev. Stat., embodying what is commonly known as the eight-hour law.

That section prescribes the length of time which shall amount to a day's work, when no special agreement is made upon the subject. It does not forbid the making of contracts fixing a different length of time as the day's work.

DEPARTMENT OF JUSTICE,
July 9, 1878.

SIR: By a circular issued from the Navy Department under date of March 21, 1878, it is announced that "the Department will contract for the labor of mechanics, foremen, leading-men, and laborers on the basis of *eight* hours a day," but that all workmen "electing to labor ten hours a day will receive a proportionate increase of their wages."

Eight-hour Law.

The inquiry orally suggested by you is whether this circular accords with the meaning and intent of section 3738 of the Revised Statutes, which declares that "eight hours shall constitute a day's work for all laborers, workmen, and mechanics who may be employed by or on behalf of the Government of the United States."

The provisions of this section (commonly known as the "eight-hour law") were fully discussed before and carefully considered by the Supreme Court of the United States in the case of *The United States v. Martin*, decided during October Term, 1876. (94 U. S. Rep., 400.)

The decision of this tribunal as to the proper construction and effect of the section in question is binding upon the Executive Departments, and controls any relation which may exist between either of those Departments and the mechanics or laborers whom they employ.

It is therefore to be ascertained whether or not the circular in question is in conformity with the section as construed by this court.

In the case named, the court, after observing that the section "was a direction by Congress to the officers and agents of the United States, establishing the principle to be observed in the labor of those engaged in its service," holds that it only prescribes the length of time which shall amount to a day's work *when no special agreement is made upon the subject*, and that it does not forbid the making of contracts fixing a different length of time as the day's work. "There are several things," the court adds, "which the act does not regulate, which it may be worth while to notice. First, it does not establish the price to be paid for a day's work." * * * "It does not specify any sum which shall be paid for the labor of eight hours, nor that the price shall be more when the hours are greater, or less when the hours are fewer. It is silent as to everything except the direction to its officers that eight hours shall constitute a day's work for a laborer. Second, the statute does not provide that the employer and the laborer may not agree with each other as to what time shall constitute a day's work." * * * "We regard the statute chiefly as in the nature of a direction from a principal to his agent that eight hours is deemed to be a proper length

Eight-hour Law.

of time for a day's labor, and that his contracts shall be based upon that theory."

The circular mentioned is in perfect harmony with this authoritative exposition of the law. It proposes to contract for labor on the basis of eight hours constituting a day's work, and herein the direction of the statute is fully conformed to. And although it provides for the allowance of a *proportionate increase* of wages where the workman *elects* to labor ten hours a day instead of eight, yet this is not at variance with the law; on the contrary, such a provision must be deemed entirely consistent with the law; and as the statute, according to the construction of the Supreme Court, does not assume to regulate the price of the labor, it is to be regarded as made not less in the interest of the employé than in that of the employer.

Since this decision was made there has been a full discussion of the subject in the House of Representatives and Senate at the last session of Congress, and it was apparently assumed throughout that the effect of the decision of the Supreme Court was that which I have regarded it to be, and that it was necessary to pass an additional act by which it should be provided in some form of words that the laborers in the navy-yards of the United States should receive for eight hours' work the same pay as other laborers of the same class receive from other employers for ten hours' work, if such was the intention of Congress in passing the section under consideration. (See Cong. Rec., vol. 7, Nos. 105 and 133.)

It was in the power of Congress, if the decision of the Supreme Court was not in conformity with the actual intent which it had in passing the law, to control the matter by subsequent legislation, which should be explicit upon this subject. That, however, was not done.

In direct answer to your inquiry, therefore, in view of the decision of the Supreme Court, I am of opinion that the circular of the Navy Department of March 21, 1878, is in accordance with section 3738 of the Revised Statutes, which embodies what is commonly known as the "eight-hour law."

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. R. W. THOMPSON,
Secretary of the Navy.

Liabilities of Sureties on Mail Contracts.

LIABILITIES OF SURETIES ON MAIL CONTRACTS.

Section 2 of the act of May 17, 1878, chap. 107, which forbids any subletting or transfer of a mail contract without the written consent of the Postmaster-General, and declares that any sublease or transfer without such consent shall be deemed a violation of the contract and authorize new advertising for the same, and, furthermore, that the contractor and his sureties shall be liable for any damages thereby resulting to the United States, does not impose any greater liability on the sureties upon contracts already existing than the one which they originally incurred.

Nor is any greater liability than that originally incurred imposed on such sureties by section 3 of the same act, which provides for the case where there has been a lawful subletting of a mail contract, and protects the subcontractor. But the provisions of this section are not to be so construed as to diminish the rights which the sureties have upon the amount that had become due the original contractor before such subletting.

The requirements of sections 2 and 3 of said act are applicable to all mail contracts, including as well those already existing or awarded as those which may be entered into in future.

DEPARTMENT OF JUSTICE,

July 9, 1878.

SIR: Replying to your letter of the 4th ultimo, in which my opinion is desired on certain questions concerning contracts for carrying the mail, I have the honor to say:

The questions mentioned, as stated by the Second Assistant Postmaster-General in a communication to you of the above date, are as follows:

"First. Are the requirements of sections 2 and 3 of the act approved May 17, 1878, applicable to contracts entered into and in operation before the said act was enacted, &c.?"

"Second. Are the said requirements applicable to the contracts awarded under the advertisement of November 1, 1877, and which do not go into operation until July 1, 1878?"

The questions, as proposed, do not distinctly suggest the aspect in which it is your wish to have these two sections considered. I therefore examine them in view of the correspondence with which they are connected, in order, as nearly as possible, to meet the inquiries apparently desired by you.

It is a familiar principle of law that a contract cannot be altered or amended, except by consent of the parties, so as to impose a greater liability than was originally undertaken;

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and this has peculiar force where the rights of a surety are involved, as the contract of a surety, being *strictissimi juris*, cannot be extended or altered without his consent, and any alteration to which he has not consented which would materially affect his rights would operate to discharge him.

It is, therefore, to be considered whether the act of May 17, 1878, if applied to contracts already made, would materially alter the position of the sureties.

Section 2 forbids any subletting or transfer of a contract without the written consent of the Postmaster-General, declares that any sublease or transfer without such consent shall be deemed a violation of the contract which shall authorize a new advertising for the same, and that the contractor and his sureties shall be liable for any damages resulting to the United States in the premises.

Do these provisions impose new liabilities upon the sureties upon contracts already existing?

The only liability here mentioned is by its terms for any damage resulting to the United States in the premises—that is, for any damage resulting to the United States by reason of an unauthorized sublease or transfer of the contract. As appears by the form furnished of these contracts as heretofore made, they all contain a stipulation on behalf of both principal and sureties that the contractor will be accountable to the United States for any damage which may be sustained by the United States through his unfaithfulness or want of care. Any damage resulting to the United States from an illegal transfer of the contract would properly come within the purview of this comprehensive clause. The position of the sureties is not altered by the provision declaring a sublease or transfer without the consent of the Postmaster-General to be a violation of it, and authorizing a new advertisement for the same.

By the act of July 17, 1862 (Rev. Stat., sec. 3737), in force when existing contracts were made, any transfer of a contract operated to annul it so far as the United States were concerned. By section 3963 of the Revised Statutes there is also a special provision made which is applicable to postal contracts, to wit: "No contractor for transporting the mail

Liabilities of Sureties on Mail Contracts.

within or between the United States and any foreign country shall assign or transfer his contract, and all such assignments or transfers shall be null and void." The present law gives authority to sublease or transfer with the consent of the Postmaster-General; but the surety originally contracted to submit to all necessary and reasonable regulations which might be made by the Post-Office Department, and it is a reasonable regulation that there shall be no sublease or transfer of the contract without the consent of the Postmaster-General. It is not, therefore, unjust to the surety to hold him responsible for any damage which may have accrued by reason of a sublease or transfer without such authority. If the contract is avoided by an illegal sublease or transfer, the surety in the original contract will be held liable only up to the date when it is thus avoided, and if the contract is relet by the Postmaster-General a new bond will be required of the person to whom it is thus relet, for whom, and for whose misfeasances, if any, the original sureties will not be liable.

I am, therefore, of opinion that the second section of the act in question does not impose a higher or greater liability on the sureties than the one which they incurred by their original contract.

The remaining question concerns section 3 of the act referred to. The object of this section is to provide for the case when there has been a lawful subletting of any contract, and the various steps to be taken and notices to be given are there provided for. It further provides that, upon the receipt of notice "by the Auditor of the Treasury for the Post-Office Department, it shall be his duty to retain, out of the amount due the original contractor or contractors, the amount stated in said notice as agreed to be paid to the subcontractor or subcontractors, and shall pay said amount, upon the certificate of the Second Assistant Postmaster-General, to the subcontractor or subcontractors, under the same rules and regulations now governing the payments made to original contractors."

This section supposes that the original contract is carried out, but that it is carried out by the intervention of a sub-

Liabilities of Sureties on Mail Contracts.

lessee or transferee who lawfully takes his position by consent of the Postmaster-General, and its object is to provide that such subcontractor shall receive the amounts which would otherwise be due to the original contractor. The suggestion made is that the liability of the surety will here be largely increased, because the subcontractor will be entitled to receive all the moneys which would be due to the original contractor, and thus the liabilities of the original contractor, for which the sureties are responsible, will not be met out of the sums which would otherwise have been due to him. But the language is cautiously used, and no amount can come to the subcontractor until it is first ascertained what is the amount due the original contractor, and the amount due the original contractor is only ascertained after it has been determined what liabilities he is under to the government, and after a deduction from the amount which would otherwise be due to him of such liabilities. All that the subcontractor, therefore, is to receive are the balances which are due to the original contractor after his liabilities are ascertained. The object of the section is thus carried out. The surety of the original contractor is protected, because the amount due the original contractor is first ascertained and proper deductions made if he is under any liability to the United States. The rights of the subcontractor are protected, because his right is to receive what is actually due the original contractor, and the law is only intended to protect him in obtaining that.

I am, therefore, of opinion that the requirements of these sections may be made applicable to all contracts, both those in existence and those which were awarded under the advertisement of November 1, 1887, and that by section 2 no greater liability is imposed upon the sureties than that already entered into, and that by section 3 no greater liability is imposed upon the sureties than that already incurred. The provisions for the protection of subcontractors are not properly to be construed so as to in any mode diminish the rights which the sureties of the original contractor have upon the amount which had become due the original contractor before the authorized transfer.

The sureties of the original contractor would not, of course,

Twenty Per Cent. Additional Duty.

have any lien on the amount due under the contract as an amount due the original contractor unless it was an amount earned before the lawfully authorized subcontract was entered upon.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. DAVID M. KEY,

Postmaster General.

TWENTY PER CENT. ADDITIONAL DUTY.

An importation of goods at Plattsburgh was there appraised by the customs officers, and subsequently entered for transportation in bond to New York. Upon arrival at the latter place, the appraiser re-examined the goods and reported that the dutiable value was greater by 10 per cent. than the value at which they were entered at the port of first arrival. The matter having been submitted to the Treasury Department, the papers were referred to the customs officers at Plattsburgh, who thereupon reported the value stated by the appraiser at New York to be the correct value of the goods at the date of importation. No reappraisal was ordered by the collector at Plattsburgh, nor was any reappraisal made there either with or without notice to the importers. Held that the 20 per cent. additional duty mentioned in section 2900 Rev. Stat. cannot be assessed upon the goods, the requisite preliminary steps required by the statute not having been taken.

DEPARTMENT OF JUSTICE,

July 10, 1878.

SIR: By your letter of the 26th ultimo, it appears that certain cigars were imported from Canada into the district of Plattsburgh, N. Y., and were there duly appraised by the customs officers, and subsequently entered for transportation in bond to New York. Upon arrival at that port, the appraiser re-examined the goods and reported that the dutiable value was greater by ten per cent. than the value stated in the entry and accepted as correct by the customs officers at the port of original importation, and submitted the matter to the Treasury Department; whereupon the papers were referred to the officers at Plattsburgh, who now report that the value as stated by the officers at New York is the correct value of the goods at the date of importation. Their opinion does not appear to be founded upon any re-examina-

Claim of Charles P. Birkett.

tion of the goods, but upon evidence presented by the customs officers at New York.

Upon these facts the question is submitted by you, whether any increase of duties can be made over those assessed on the value originally found by the officers at the port of first arrival, and, if so, whether the 20 per cent. additional duty imposed by section 2900 of the Revised Statutes can also be assessed.

Upon the facts as thus stated, I am of opinion that the 20 per cent. additional duty mentioned in the Revised Statutes, section 2900, cannot be assessed upon the cigars imported from Canada and entered for transportation at Plattsburgh. It is only in the course of a correspondence with the Treasury Department, and upon evidence submitted to them by the New York appraisers, that the appraisers at Plattsburgh have conceded the judgment of the New York officers as to the value of the goods to have been correct and their own erroneous. There does not appear to have been any reappraisal ordered by the collector at Plattsburgh, nor that such reappraisal was made either with or without notice to the importers.

The requisite preliminary steps not having been taken which are required by the statute, the 20 per cent. penalty cannot be imposed.

Very-respectfully, your obedient servant,

CHAS. DEVENS.

Hon. JOHN SHERMAN,
Secretary of the Treasury.

CLAIM OF CHARLES P. BIRKETT.

The clause in the sundry civil act of June 20, 1878, chap. 359, namely, "To pay Charles P. Birkett the sum of \$32,505.71, to reimburse the said Birkett, late United States Indian agent, for money expended by him for the benefit of the Indians at Ponca agency, Dakota," does not amount to a determination by Congress that such sum is actually due to Birkett. It contemplates that there will be an examination by the proper officers of the amount so expended.

Accordingly it is the duty of the auditing officers to ascertain whether the amounts expended by Mr. Birkett for the benefit of said Indians

Claim of Charles P. Birkett.

equal the sum appropriated, and, if not, to allow him out of the appropriation only that which is found to be due him upon settlement of his accounts for such expenditures.

DEPARTMENT OF JUSTICE,

July 12, 1878.

SIR: Your letter of the 6th instant calls my attention to the language found on page 29 of the act "making appropriations for sundry civil expenses," approved June 20, 1878, namely: "To pay to Charles P. Birkett the sum of thirty-two thousand five hundred and five dollars and seventy-one cents, to reimburse the said Birkett, late United States Indian agent, for money expended by him for the benefit of the Indians at Ponca Agency, Dakota," and inquire whether by this language the amount to be paid to Birkett on account of said expenditures is settled and determined, so that no auditing, final examination, or certification thereof is necessary at the Treasury Department.

The language referred to is found in a portion of the act in regard to Indian affairs, and is preceded by two clauses, which commence with the words "to enable the Secretary of the Interior to pay" certain individuals certain sums, and after the language in question is found a further clause "to enable the Secretary of the Interior to pay" a certain other individual a certain sum.

On examining the original bill, it will be found that the clause in regard to Birkett, as well as several other clauses, are introduced into the original structure of the bill as amendments thereof. I am of opinion that this clause, together with another clause which is headed "to pay" simply, are to be construed with reference to that general structure of the bill, and that the construction to be given is that the appropriation is one to enable the Secretary of the Interior to pay to Birkett this sum. It does not appear to be an adjudication that such sum is actually due to Birkett, but contemplates that there will be an examination by the proper auditing and accounting officers of the amount so expended. While it is undoubtedly competent for Congress to direct that a certain sum be paid to a particular individual, and itself to determine positively the sum which such individual is entitled to receive,

Claim of Charles P. Birkett.

yet language to that effect should be explicit. Where a system of accounting and auditing exists such as is found in the laws of the United States, an interpretation of the law which would dispense with such system is not one to be favored. There is no direction to the Secretary of the Treasury here to pay Birkett this sum. The Secretary of the Interior is simply enabled to do so. Investing the Secretary of the Interior with power to pay this amount is not to be construed as a settlement of the account or as a positive direction that it shall be paid.

The account for expenditures by Birkett against the United States was not apparently covered by any law, but was deemed to be by Congress meritorious and one which should properly be paid; but, while the claim is made legal because meritorious, the auditing and accounting officers are not divested of their authority in the matter.

It is suggested that the words "or so much thereof as may be necessary" are not found in this appropriation. But while the use of these words is not infrequent, the omission of them cannot be construed as making an explicit direction to the Secretary of the Interior to direct the payment, or to the Secretary of the Treasury to pay the amount named.

In direct answer, therefore, to your inquiry, I have to say that I deem it the duty of the auditing officers to determine whether the amounts expended by Mr. Birkett for the benefit of the Indians at Ponca Agency equal the sum of \$32,505.71, and, if not, to pay him such sum as is found to be due to him upon his accounts therefor.

In this connection, it may not be improper to add that an examination of the papers shows that the sum appropriated could not be the actual sum due to Mr. Birkett according to his own claim, because there had been a payment of the sum of \$129.11 to him as a sum which properly could have been audited and paid.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. JOHN SHERMAN,
Secretary of the Treasury.

School Lands in California.

SCHOOL LANDS IN CALIFORNIA.

The words "or are otherwise defective or invalid," as used in the second section of the act of March 1, 1877, chap. 81, relating to indemnity school selections in the State of California, refer to indemnity selections which are invalid or defective for some other reason than that the lands in lieu of which they were made are not included within the final survey of a Mexican grant. Thus, where a selection made by the State was of land then in reserve, and the selection was for that reason defective or invalid, the words quoted above apply to this case, and such selection is confirmed by said act to the State.

Where there was no sixteenth or thirty-sixth section, in lieu of which an indemnity selection has been made, no title to the land embraced by such selection passes to the State.

Seem that where two or more indemnity selections have been made in lieu of the same sixteenth or thirty-sixth section, the State is entitled to but one of the indemnity selections; there being nothing in the act of March 1, 1877, from which it can be fairly inferred that double selections were meant to be ratified, and that the State should thus obtain a greater quantity of land than had originally been allowed by law for school purposes.

DEPARTMENT OF JUSTICE,

July 12, 1878.

SIR: It appears from your communication of February 28, 1878, that by the sixth section of an act of Congress approved March 3, 1853, entitled "An act to provide for the survey of the public lands in California, and the granting of pre-emption rights therein, and for other purposes," the sixteenth and thirty-sixth sections of land in each township in California were granted to said State for school purposes. (10 Stat., 244.)

By the seventh section of the same act indemnity was provided for such sections, or parts of sections, as might be occupied by actual settlers at the date of survey, or where such sections were reserved for public uses or taken by private claims, and thereby lost to the State. Many of the sixteenth and thirty-sixth sections granted by said act were found on examination to be located within the claimed limits of private grants made by the Spanish or Mexican Governments, the boundaries of which had not been specifically determined by final survey.

Before it was ascertained whether such school sections were lost to the State by being included within the limits of the

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final surveys of such private grants, the State proceeded to make indemnity selections in lieu of such lands. In some cases two or more selections were made in lieu of the same sixteenth or thirty-sixth sections; in other cases selections were made in lieu of sixteenth and thirty-sixth sections which had no existence; and in others the lands selected as indemnity were in a state of reservation at the date of selection, and the selections were invalid for that reason.

These irregularities seem to have escaped the attention of the Land Department, and the lands were certified to the State as valid selections. The lands so selected by the State had in many instances been settled upon and improved by qualified pre-emption claimants, some of whom settled before and some after the lands were certified to the State, and great confusion was occasioned by these conflicting claims, which finally resulted in the passage of "An act relating to indemnity school selections in the State of California," approved March 1, 1877. (19 Stat., 267.)

The question presented by your letter is as to the construction of the words "or are otherwise defective or invalid," which are found in the second section of the act of March 1, 1877; the inquiry being whether these words apply to and confirm all indemnity school selections invalid for any reason, which had been certified to the State prior to the passage of said act, or whether by the true construction of this section it is only intended to confirm to the State its selections in those cases in which the sixteenth and thirty-sixth sections are found not to have been included within the limits of a Mexican grant, and therefore to have been such that the State would have been entitled to them, and, of course, would not have been entitled to indemnity for their loss.

The first section of this act confirms the title to the lands certified to the State of California, known as "indemnity school selections," which had been selected in lieu of sixteenth and thirty-sixth sections lying within Mexican grants, of which grants the final survey had not been made at the date of such selections by the State. As the State was entitled to indemnity according to the previous law for these sections, the only object of this section of the statute was therefore to

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confirm the title where the selections had been made in anticipation of the final survey.

The second section of the act is as follows:

"That where indemnity school selections have been made and certified to said State, and said selections shall fail by reason of the land in lieu of which they were taken not being included within such final survey of a Mexican grant, or are otherwise defective or invalid, the same are hereby confirmed, and the sixteenth or thirty-sixth section, in lieu of which the selection was made, shall, upon being excluded from such final survey, be disposed of as other public lands of the United States: *Provided*, That if there be no such sixteenth or thirty-sixth section, and the land certified therefor shall be held by an innocent purchaser for a valuable consideration, such purchaser shall be allowed to prove such facts before the proper land-office, and shall be allowed to purchase the same at one dollar and twenty-five cents per acre, not to exceed three hundred and twenty acres for any one person: *Provided*, That if such person shall neglect or refuse, after knowledge of such facts, to furnish such proof and make payment for such land, it shall be subject to the general land laws of the United States."

It is not questioned that the effect of this section is to confirm to the State of California the selection of lands made by it as indemnity for those sections which have been since found not to have been included within the final survey of a Mexican grant, and to reinvest the United States with the title thereto, to be disposed of as other public lands of the United States. But it is contended that the words "or are otherwise defective or invalid," when applied to the selections made by the State of California, cannot be construed as investing that State with the title, if at the time the selections were made by it the lands selected were reserved by the United States. It could not be argued that the confirmation of the United States could extend beyond its own title, nor that this language could operate to cure defects and invalidities of which others were entitled to take advantage. But in the view of the case which presents itself to me, it seems that these words are intended to confirm to the State,

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in spite of any defects or invalidities which have existed in its selections other than the defect arising from the fact that there was no original basis for the selection, the lands selected, and that a confirmation of this character can only be interpreted properly as in the nature of a grant *de novo* of the lands thus selected.

It has been argued that where lands have been selected in lieu of other lands which could properly have come to the party entitled to select, such selection might be treated as voidable only, and that such was the intention of Congress in this act; while where the selection was made of lands which were in reservation, such selection was of necessity void. Without undertaking to discuss the well-known distinction between those acts which are void and those which are voidable only, it is difficult to see why when the basis of the selection itself is wanting the selection is not as much void as it is when the land selected was not at the time subject to selection. The statute is in its nature a remedial statute, is to be construed generously in order to give to the State the benefit which it was intended to receive for school purposes, and to relieve the difficulties which had arisen in the State by reason of the peculiar complications from the Mexican grants.

By other parts of the statute it will be seen that the rights of actual settlers are carefully guarded, and in a question of interpretation between the United States and the State, the words "or are otherwise defective or invalid" are to be construed so as to carry out the evident idea of the statute in confirming to the State the selections which had been made by it.

I am therefore of opinion that where it has been found that the selection made by the State was a selection of land then in reserve, and that in that way the selection of the State is defective and invalid, the words "or are otherwise defective or invalid" are to be so construed as to confirm this selection to the State. The words "or are otherwise defective or invalid" clearly point to defects different from those which have arisen by reason of the fact that there had been no loss of lands in lieu of which selections were made. And, to judge from the correspondence connected with your letter,

School Lands in California.

the defect which has most generally occurred has been by reason of the selection of property of the United States which at that time was in reserve. It was entirely competent for the United States as between it and the State of California to grant this, and when the general object of the statute is considered the interpretation that in such case it does grant it seems to be a reasonable and proper one. Of course it is to be understood in this connection that where there was no sixteenth or thirty-sixth section, which is the case covered by the first proviso of the second section, no title can pass to the land thus selected; and such intention is clearly indicated by the proviso, which in such case permits an innocent purchaser to receive a title to it upon proving the fact before the proper land office and payment of \$1.25 per acre, provided that he makes such application within a reasonable time, and, if no such application be made, enacts that it shall be subject to the general land laws of the United States.

As I am informed by your letter that in certain cases two or more selections have been made in lieu of the same sixteenth or thirty-sixth section of land, I ought to add that I do not by this opinion intend to imply that the State is entitled to more than one selection in lieu of any one section. By the statute of July 23, 1866, in regard to school lands in California, it was provided that the State of California could not receive under this act a greater quantity of land for school improvement purposes than she was entitled to by law, and although this proviso is not repeated in the act which we are at present considering, yet there is nothing in it from which it can fairly be inferred that where double selections are made they were to be ratified, or that the State was, by reason of any mistake in the making of duplicate selections, to obtain a greater quantity of land than had originally been allowed by law for school purposes.

In conclusion, I should perhaps call attention to the third and fourth sections of the act we are discussing. The third section provides that the confirmation shall not extend to lands settled upon by actual settlers not exceeding the prescribed legal quantity, provided such settlement was made in good faith and prior to the date of the certification of the

Lien of Inland Carriers.

lands to the State, and provided further that the claims of such settlers should be presented to the register and receiver of the district land office within a time named; and the fourth section provides that the act shall not apply to certain lands therein specified.

In immediate answer, therefore, to the inquiry of your letter, I would say that the words "or are otherwise defective or invalid" refer to selections that are invalid or defective for some other reason than that the lands in lieu of which they were made shall be excluded on final survey from a Mexican grant, and that a simple confirmation to the State of such selections because the same were otherwise defective or invalid on account of the condition of the lands when selected was all that was necessary to quiet the title of the State to them.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. CARL SCHURZ,

Secretary of the Interior.

LIEN OF INLAND CARRIERS.

Section 2981 Rev. Stat. does not require customs officers to recognize the lien of inland carriers upon goods transported in bond.

The Secretary of the Treasury has no authority, under section 2993 Rev. Stat., to protect such lien by a Treasury regulation.

DEPARTMENT OF JUSTICE,

July 15, 1878.

SIR: In reply to your inquiry of the 23d of April last, I have to say that I concur in the ruling heretofore made by the Treasury Department in accordance with the views of Assistant Secretary French, that Rev. Stat., sec. 2981, does *not* require customs officers to recognize the lien of inland carriers of goods transported across this country in bond. Though the case stated, of merchandise imported from China and Japan into San Francisco and thence brought in sealed cars to New York, would seem to be analagous to the liens already protected by law, it is not within the specific statu-

Case of Thomas Lanigan—Modification of Contract.

tory provisions, which can be extended to cover it only by Congressional action. It is to be noticed that the Rev. Stat., sec. 2981, recognizes only the lien of the owner or consignee of the vessel or vehicle in which goods arrive; whereas the act of July 18, 1866, chap. 201, sec. 17, which it superseded, provided for the protection of *all* liens.

While this construction of section 2981 is not controverted by counsel for the railroad company interested, it is suggested by him that you might, under section 2993, require the property to be held to protect this lien by a Treasury regulation. A perusal of this latter section, however, will show that it is only the conditions of the bond to be given by the common carrier that you are authorized to establish by such regulation.

The documents forwarded by you are herewith returned.

Very respectfully, your obedient servant,

CHAS. DEVENS.

HON. JOHN SHERMAN,

Secretary of the Treasury.

CASE OF THOMAS LANIGAN—MODIFICATION OF CONTRACT.

In September, 1876, L. contracted to deliver beef cattle at the Pawnee and several other Indian agencies, and by article 5 of the contract "not over one-fourth at each delivery were to be cows." On February 5, 1877, said article was modified as follows: "In the requirements of three-fourths of each delivery to be steers and one-fourth cows, so that the restriction as to the proportion of steers and cows is removed, but for all cows delivered in excess of the one-fourth provided for in the contract a deduction of 6 per cent. shall be made from the net price of \$3.56 per one hundred pounds at the Pawnee, and \$3.73½ at the other agencies." *Held* that under the modification the contractor is permitted to deliver cows in excess of one-fourth of the number of steers delivered, and that upon the cows delivered in excess of the one-fourth he is subjected to a deduction of 6 per cent., but that he is not entitled to full payment for one-fourth of all the cattle delivered where all the cattle delivered are cows. Thus, if he delivered one hundred cattle, of which three were steers and the rest cows, he would be entitled to receive on the three steers and one cow full payment, and on the remaining ninety-six cows he would be subjected to the 6 per cent. deduction. If the one hundred cattle delivered had been all cows, he would be subjected to the 6 per cent. deduction on the whole delivery.

Case of Thomas Lanigan—Modification of Contract.

DEPARTMENT OF JUSTICE,
July 15, 1878.

SIR: By your letter of April 4 last, it appears that a contract was made by the Commissioner of Indian Affairs with Thomas Lanigan, of Fort Smith, Ark., September 8, 1876, for delivery at the several Indian agencies therein enumerated of the amount of 8,200,000 pounds of beef, gross weight, and that said contract was modified on February 3, 1877.

Under the contract, Thomas Lanigan was to deliver at Cheyenne and Arapahoe, Kiowa and Comanche, Wichita and Osage Indian Agencies 6,700,000 pounds of beef, gross weight, for which he was to be paid at the rate of \$3.73½ per one hundred pounds net weight, and at the Pawnee Agency he was to deliver 1,500,000 pounds of beef, gross weight, for which he was to be paid at the rate of \$3.56 per one hundred pounds net weight.

The net weight of the cattle delivered at said agencies was to be determined by deducting 50 per cent. from the gross weight thereof, as ascertained on the Government scales at the several agencies.

By article 5 of the contract, it was agreed by and between the contracting parties that the cattle furnished under the same should be good, healthy, merchantable beef cattle, not over seven years of age, and *not over one-fourth at each delivery to be cows.*

By your letter it appears that the term "merchantable beef cattle" is defined by the Indian Bureau, in making contracts of this character, to mean *steers*, and such is understood to be the common acceptance of the term in the markets of the country.

On January 23, 1877, article 5 of the original contract was modified by the Commissioner of Indian Affairs, and the modification was accepted by the contractor on February 3, 1877, in the following words: "In the requirements of three-fourths of each delivery to be steers and one-fourth cows, so that the restriction as to the proportion of steers and cows is removed, *but for all cows delivered in excess of the one-fourth provided for in the contract* a deduction of 6 per cent. shall be made from the net price of \$3.56 per one hundred pounds at the Pawnee, and \$3.73½ at the other agencies."

Case of Thomas Lanigan—Modification of Contract.

The contractor claims that by the modified contract the proportion provided for in article 5 of the original contract was destroyed, and that under the contract as modified he could deliver beef cattle, all of which might be of an inferior quality, that is, all cows; and that for one-fourth of the inferior quality of cattle so delivered under the modification of the contract he was to receive the full price for the net weight thereof provided for by the original contract; and that for the remaining three-fourths of the inferior quality of cattle so delivered there was to be deducted 6 per cent. from the net price provided for by the original contract; for instance, if, under the modified contract at any one time he presented at the Pawnee Indian Agency 400 cows for delivery under said modified contract, he claims to be entitled for the net weight of one hundred of said cows at the rate of \$3.56 per one hundred pounds net, the price provided for by the original contract; and for the remaining 300 cows, according to his claim, he is to be paid at the rate of \$3.56 per one hundred pounds net, with a deduction of 6 per cent. from the total amount thereof.

It is suggested in your letter that the construction contended for by the contractor is in conflict with article 10 of the contract, which forbids any modification to be made in it giving the contractor an increased rate of compensation over that specified in the contract.

Even if the construction in question has the effect to render the contract more profitable to the contractor and less advantageous to the Government, this is not material. Such a provision as that in article 10 is always one that can be changed; and when the parties to a contract subsequently by mutual consent waive or rescind any stipulation whatever contained in it, each party is entitled to the benefit of such waiver or rescission in whose favor it may operate. If the modification now in question is in conflict with article 10 of the contract, it legally operates to waive or rescind it.

It is necessary, therefore, to determine what is the true construction of this modification. It seems to me that its true construction is that the proportion of steers and cows provided for in the original contract is removed only so far as this: that the contractor is permitted to deliver cows in excess of

Case of Thomas Lanigan—Modification of Contract.

one-fourth of all the animals delivered, and that upon the cows delivered in excess of the one-fourth he is subjected to a deduction of 6 per cent., but that the modification does not entitle him to receive full payment for one-fourth of all the animals delivered even if the whole of the animals should be cows. From the provisions of article 5 the contractor was to furnish both kinds of cattle in the proportion of three-fourths of the superior quality to one-fourth of the inferior quality at each delivery, thereby bringing up the standard price of the inferior quality to that which was the price of both qualities in these proportions. If, under the provisions of the fifth article, at any one time the contractor had presented for delivery before any one of the Indian agents at the agencies specified in the contract 500 cattle, 300 of which were steers and 200 cows, of the number so presented 300 steers and 100 cows only would have been accepted and the remaining 100 cows would have been rejected. Under the contract as modified, if 500 similar head of cattle had been so presented for delivery at any one time, of the number 300 steers and 100 cows would have been paid for at the net price provided in the original contract, and the remaining hundred cows would have been received and paid for at the net price provided for in the original contract with a deduction of 6 per cent. from the total amount thereof, according to the modification of the contract. The claim that he has a right to deliver one-fourth cows, and receive the full price therefor, notwithstanding his whole delivery may be cows, is, in my opinion, unfounded. So far as he delivers steers and cows together he is entitled to deliver them in the proportion of three-fourths to one-fourth and to receive the full original contract price; but for any amount over that he is compelled to submit to the deduction provided for in the modified contract, which only permits deliveries in excess of the one-fourth cows subject to the condition that there shall be a deduction of 6 per cent. It would follow from this that if he made a delivery of all cows he would in regard to all of them be subject to the deduction of 6 per cent., according to the modified contract. If he made a delivery of one hundred animals of whom three were steers and ninety-seven were cows, he would be entitled to receive on the three steers and one cow the full amount of the original contract price,

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and upon the remaining ninety-six animals he would be compelled to submit to the deduction of 6 per cent., according to the modification of the contract.

This seems to be the sensible interpretation of the contract, and by it all advantages are gained by the contractor that should properly be his.

His complaint was that he could not find steers in order to make the deliveries. The modification therefore intended by the contract was that cows should not be rejected which were in excess of the original proportion of one to three; and so far as he can carry out the original contract he gets the entire benefit of it, while so far as it is modified at his request in order to enable him to deliver cows, which, according to the original contract, would have been rejected, he delivers them, but is compelled to submit to the deduction of 6 per cent. In the original contract the price to be paid for the cows was put at a higher price than would have otherwise been paid, by averaging it with that of a higher grade of beef, to wit, the steers. A subsequent modification, however, as to the proportion of the inferior article to be permitted at each delivery, cannot be interpreted as an intention to surrender without consideration the right of the Government under the original contract, and to allow the contractor to be paid the full price for the inferior article unaccompanied by the stipulated proportion of the superior article.

In this connection my attention has been called to the fact that certain settlements have been made with the contractor by which he has been paid according to the construction of the contract as made by him. I do not understand, however, that such payments have been made under any such circumstances as will entitle him to treat the Government as having so construed a doubtful contract as to justify him in claiming that it is bound by such construction.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. CARL SCHURZ,

Secretary of the Interior.

Southern Pacific Railroad Grant.

SOUTHERN PACIFIC RAILROAD GRANT.

The act of July 27, 1866, chap. 278, made a grant of lands to the Southern Pacific Railroad Company (of California), which would acquire precision only upon the location of the line of the road. But the line designated upon the map filed by the company in the Interior Department, January 3, 1867, was a line which, at the time, it had no authority to adopt, although subsequently (by an act of the California legislature of April 4, 1870) such authority was obtained by it. Hence the grant did not, upon the filing of that map, become attached to any of the lands along the line designated thereon.

The company was subsequently authorized, by the resolution of June 28, 1870, to construct its road upon the line indicated by the map filed as aforesaid; and thus it was enabled to place the grant upon lands along the line so indicated.

The withdrawals of lands along the line designated upon said map (by order of Secretary Browning, March 19, 1867, and August 20, 1868, and by order of Secretary Cox, December 15, 1868, and July 26, 1870) were made by competent authority, and the lands thereby put in a state of reservation, so that no legal rights therein could be acquired under the general land laws.

But the resolution of June 28, 1870, expressly saves and reserves all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of the act of July 27, 1866, chap. 278. By this saving clause it was intended that actual settlers then upon the lands, in addition to those who were rightfully pre-emptors and homesteaders, should have their equitable rights respected, and be allowed, upon making proper proof of their actual settlement, to obtain title to their lands under the general land laws.

DEPARTMENT OF JUSTICE,
July 16, 1878.

SIR: It appears that by an act of Congress approved July 27, 1866, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast" (14 Stat., 292), certain persons therein named, and their successors, were "created and erected into a body corporate and politic, in deed and in law, by the name, style, and title of the 'Atlantic and Pacific Railroad Company.'" Said act further provided: "and said corporation is hereby authorized and empowered to lay out, locate, and construct, furnish, maintain, and enjoy, a continuous railroad and telegraph line, with the appurtenances, namely, beginning at or near the town of Springfield, in the State of Missouri; thence to the

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western boundary line of said State, and thence by the most eligible railroad route as shall be determined by said company to a point on the Canadian River; thence to the town of Albuquerque, on the river Del Norte, and thence, by way of the Agua Fria, or other suitable pass, to the headwaters of the Colorado Chiquito, and thence, along the thirty-fifth parallel of latitude, as near as may be found most suitable for a railway route, to the Colorado River, at such point as may be selected by said company for crossing; thence by the most practicable and eligible route to the Pacific."

By the third section of said act there was granted to said company "every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plot thereof, filed in the office of the Commissioner of the General Land Office."

The eighteenth section of said act reads as follows:

"And be it further enacted, That the Southern Pacific Railroad, a company incorporated under the laws of the State of California, is hereby authorized to connect with the said Atlantic and Pacific Railroad, formed under this act, at such point, near the boundary line of the State of California, as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare with said road; and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific Railroad herein provided for."

The Southern Pacific Railroad was a railroad incorporated by a general law of the State of California. By that law it was enacted that "any number of persons, not less than ten,

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either in this State or through any portion of the Territories of the United States contiguous to the State, being subscribers to the stock of any contemplated railroad, may be formed into a corporation for the purpose of constructing, owning, and maintaining such railroad, by complying with the following requirements”:

Among other provisions, in the details of the law, are the following, which become important in considering the question submitted by you:

“SEC. 2. The said articles of association shall set forth”

* * * “the place from and to which the proposed road is to be constructed, and the counties into and through which it is intended to pass, and its length as near as may be.”

Section 7 of said act, after conferring the power to select the most advantageous route for the railroad, by subdivision second confers also the power “to receive, hold, take, and convey, by deed or otherwise, the same as a natural person might or could do, such voluntary grants and donations of real estate and other property of every description as shall be made to it, to aid and encourage the construction, maintenance, and accommodation of such railroad.”

By subdivision 6, authority is given “to cross, intersect, join and unite its railroad with any other railroad, either before or after constructed, at any point upon its route, and upon the grounds of such other railroad company.”

By subdivision 7, such company “may change the line of its road, in whole or in part, whenever a majority of the directors shall so determine, as is provided hereinafter; but no such change shall vary the general route of such road as contemplated in the articles of association of such company.”

The eighteenth section prescribes the mode in which such changes may be made, requires the filing of a map, and closes with this provision: “But nothing in this act shall be so construed as to confer any powers on such companies to so change their road as to avoid any point named in their articles of association, except as provided in section 17, subdivision 7, of this act.”

Section 43 requires each company, “within a reasonable time after their road shall be finally located,” to “cause to be made a map and profile thereof, and of the land taken and

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obtained for the use thereof, and the boundaries of the several counties through which said road may run, and file the same in the office of the Secretary of State."

On the 25th of November, 1865, articles of association were entered into by T. G. Phelps and others, under the provisions of the foregoing law, forming a corporation to build a contemplated railroad, the terminal points of which are thus stated: "From some point on the bay of San Francisco, in the State of California, through the counties of Santa Clara, Monterey, San Luis Obispo, Tulare, Los Angeles, and San Diego, to the eastern line of said State of California, there to connect with a contemplated railroad from said eastern line of the State of California to the Mississippi River."

Apparently all necessary steps were taken to give the Southern Pacific Railroad a corporate existence, and to entitle it to all the rights and franchises granted to it by the State of California and by the United States.

On January 3, 1867, the Southern Pacific Railroad Company filed a map with the Commissioner of the General Land Office, showing the line of route adopted by said company for the construction of its road, which map locates the line of the road under the act of Congress through the counties of San Bernardino and Kern, two counties not named in the articles of association, and does not pass through the counties of San Diego, Los Angeles, and San Luis Obispo, nor touch the town of San Diego upon the Pacific coast, counties and a town which are named as, upon the route fixed in the articles of association. To extend the road to San Francisco would also require it to pass through the county of San Mateo, not named in the articles of association.

On March 19 following the filing of said map, Mr. Secretary Browning directed the Commissioner of the General Land Office to cause the necessary instructions to be issued to the local officers to withhold from sale or disposal the odd sections within the granted limits of twenty miles on each side of said road as shown on the map before mentioned, and also the odd sections outside of the twenty miles and within thirty miles on each side of said road from which indemnity for land disposed of by the Government within the granted limits should be taken.

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On July 14, 1868, said order of withdrawal was revoked, and the lands included therein were restored to market.

On August 20 following, the latter order was suspended so far as it related to lands south of San José.

On November 2 and 11, 1869, Mr. Secretary Cox issued instructions revoking the suspension made by Mr. Secretary Browning on August 20, 1868, aforesaid, and ordered the lands mentioned therein to be restored to market after sixty days' notice.

On December 15 following, the orders of restoration of the 2d and 11th of the preceding month were suspended.

On July 25, 1868, the time for the construction of said road was extended by Congress. (15 Stat., 187.)

On June 28, 1870, a joint resolution of Congress was approved (16 Stat., 382) authorizing the Southern Pacific Railroad Company to construct its road on the route indicated by the map filed as aforesaid January 3, 1867, and providing that upon proof being filed in the Department of the Interior of the construction of said road, in sections as therein mentioned, "it shall be the duty of the Secretary of the Interior to cause patents to be issued to said company for the sections of land coterminous to each constructed section reported as aforesaid, to the extent and amount granted to said company by the said act of July 27, 1866, expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act."

On July 26, 1870, Mr. Secretary Cox issued instructions that the reservation ordered on March 19, 1867, should be respected.

Two hundred and thirty miles of said road have been constructed and examined by commissioners appointed by the President, and their reports accepted.

On April 23, 1875, it was decided by Mr. Secretary Delano, then Secretary of the Interior, that the act of July 26, 1866, made a grant of land to said company, to be afterwards located, and that the filing of the map of its route on January 3, 1867, gave it precision, so that it attached to particular tracts of land.

Notwithstanding said decision, the matter has continued

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under discussion, and your letter proposes to me these three inquiries :

"First. Did the act of July 27, 1866, make a grant of lands to the Southern Pacific Railroad Company ?

"Second. If so, was said company authorized to locate its road on the line designated on the map filed in this Department January 3, 1867 ?

Third. If not, what effect should be given to the joint resolution of Congress of June 28, 1870 ?"

In reply to the first inquiry, I would say that in my opinion the act of July 27, 1866, did make a grant of lands to the Southern Pacific Railroad.

A grant of specific lands to a contemplated railroad would necessarily be a very unsatisfactory one, owing to the uncertainty as to the route which the road would take. This grant to the Southern Pacific Railroad was a grant of lands which were to depend for their situation upon the line of the road, and it would acquire precision only after a map had been filed and other proper steps taken, which steps, however, must have been taken within the limits of the grant as made. A grant to a railroad company of lands to be located upon a particular line, or in a particular direction, cannot be construed as a grant which may be located upon a different line or in a different direction. It is in this respect not dissimilar to the Mexican grants, which are known as "floats," where a right exists to lay out three leagues within certain exterior limits. This right, although it requires, in order to give it precision, that it shall be placed upon three particular leagues, yet cannot be extended to any lands outside of the exterior limits.

It is therefore important to inquire in the present case not only whether a grant of lands was made to the Southern Pacific Railroad, but whether the map filed by said road was upon a route which it had then a right to build and locate according to the laws of the State of California, under which it had its existence. Upon examining the map filed, and observing the fact that the law of California required that the contemplated railroad should pass through all the counties and towns named, and that it gave no authority to pass through counties not named in the articles of association, it

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must be held that the line adopted by the Southern Pacific Railroad, according to the map, was a line which at the time it had no authority to adopt. To hold, therefore, that it was entitled to lands along this route would be to hold that Congress, by a grant to a railroad which had a legal existence only in one place and along one line, thereby granted lands to the same road when it transferred itself to another line upon which it had no lawful existence. It is not important that at a subsequent date, to wit, on April 4, 1870, an act of the Legislature of California ratified the proceedings by which this railroad company undertook to transfer itself from one route to another. That act could have no effect upon transactions long previous, at least not where any other rights had intervened.

The act of July 27, 1866, which was the basis of all subsequent acts, did not create in the Southern Pacific Railroad Company a new corporation under national authority, nor assume to confer upon it additional or antagonistic powers to those conferred by the State of California.

In reply, then, to your first two inquiries, I would say that the act of July 27, 1866, did make a grant of lands to the Southern Pacific Railroad Company, but gave it no authority to locate its road upon the line designated upon the map filed in the Department January 3, 1867.

The next subject to be considered is as to the effect to be given to the resolution of Congress of June 28, 1870. This resolution recognizes the act of July 27, 1866, as an act making a grant of lands to the Southern Pacific Railroad Company, and authorizes it to construct its road upon the route indicated by the map filed by the company January 3, 1867, and also directs that, upon proper reports, "it shall be the duty of the Secretary of the Interior to cause patents to be issued to said company for the sections of land coterminous to each constructed section reported as aforesaid, to the extent and amount granted to said company by the said act of July 27, 1866, expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act." It therefore enables the company, in placing their grant upon the land, to place it upon the line as indicated by the map;

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and as before this resolution they had no authority to locate upon this line, its effect would be virtually, although not technically or strictly, to constitute a grant along the line of the map.

In this connection it is proper to consider what effect is to be given, so far as persons claiming rights in the lands in question are concerned, to the various withdrawals which were made of them by the several Secretaries of the Interior from the time when the map was filed, January 3, 1867, up to the passage of the resolution of June 28, 1870. These lands were withdrawn from the market substantially all the time. It is contended by the counsel for settlers that when thus withdrawn from the market by the Secretaries of the Interior they were wrongfully withdrawn, by reason of an error in law, upon their part; that being thus wrongfully withdrawn, it was in the power of all citizens of the United States to acquire the same rights in them which they might acquire in other public lands of the United States; and that these acts of the Secretaries are to be treated as therefore entirely ineffective and nugatory.

Even if it be conceded that the acts of the Secretaries in this respect were erroneous in law, the consequence does not follow which is contended for on behalf of the adverse claimants to the land. They were in fact withdrawn by competent authority, and were thus placed in a state of reservation. It must often happen, from the nature of the transactions connected with the public lands and the legislation affecting them, that the Secretary of the Interior is uncertain whether or not lands should be withdrawn, or whether a greater or less amount should be withdrawn, in order to protect grants, or comply with other legislation of the United States; and it is often found that such withdrawals in the end have been unnecessary. But he has the authority to put them into a state of reservation, so that all questions in reference to them may be properly considered; and when thus reserved it is not in the power of a party to acquire rights by treating such reservation as of no effect. (*Wallcot v. Des Moines Co.*, 5 Wall., 681; *Kiley v. Welles*, No. 377, December Term, 1869; *Williams v. Baker*, 17 Wall., 144; *Cilley v. Burrows*, 17 Wall., 167.)

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It is to be observed that the resolution of June 28, 1870, which is the authority by which the Southern Pacific Railroad locates its line along the route on the map, saves and reserves all rights of actual settlers, in addition to those contained in the act of July 27, 1866, which reserves the rights of all homestead and pre-emption claimants. It is therefore to be determined what is meant by the saving clause in the joint resolution.

It is a saving clause separate and distinct from the other reservations made in the third section of the act of July 27, 1866. It is to be inferred, therefore, that there was an object and a reason for this additional reservation. Congress must necessarily have been aware that during the differences of opinion and conflict of orders which had been given in regard to these lands much injury might be done to actual settlers upon them, and it is to be inferred that this clause was intended to protect those who had actually made settlements, and thus necessarily made improvements upon the land. The word "settler" might mean only a legal occupant of the public lands under the public land laws; but the use of the word "actual" by Congress indicates that the class for whom it was legislating in this saving clause is something different, and consists of those persons who had actually gone upon the land in the capacity of settlers. While those who actually settled could not gain legal right as long as the lands were in reservation, and could not gain the inchoate rights of pre-emptors or homesteaders, they had a strong claim upon the consideration of Congress when it finally determined to permit this railroad to locate its grant upon another line than that which it had originally intended. The words "actual settlers" must therefore receive an interpretation, and cannot be regarded as a mere meaningless phrase; and when found in this joint resolution it was intended by this saving clause that actual settlers, in addition to those who were rightfully pre-emptors and homesteaders, should have their equitable rights respected, and should be allowed, upon making proper proof of their actual settlement, to obtain title to their lands under the general public laws of the United States.

The effect, then, to be given to the joint resolution of June

Sale of Cigars and Tobacco at Retail.

28, 1870, is that it permits the location by the Southern Pacific Railroad of its road according to the line of the map, but that the rights of actual settlers then upon the lands are to be saved, in addition to those provided for by the act of July 27, 1866.

Certain questions have been raised on behalf of settlers upon these lands, as to whether the acceptances by the President of the various sections of the road as constructed were in legal form so that patents therefor could have properly been granted. I have not deemed it necessary to examine the question of whether such acceptance was in legal form, as I cannot perceive that it in any way affects the rights of any settler upon the land. Such an inquiry raises a question only between the railroad and the United States.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. CARL SCHURZ,

Secretary of the Interior.

SALE OF CIGARS AND TOBACCO AT RETAIL.

Upon consideration of the following sections of the Revised Statutes, namely, sections 3236, 3244, 3362, 3363, 3387, 3390, and 3392: *Held* that the manufacture of cigars and tobacco, and the sale of cigars and manufactured tobacco at retail, cannot be lawfully carried on at the same time in the same place—that the manufacturer of these articles is not authorized to sell from broken packages, under a retail dealer's license, at the place of manufacture.

DEPARTMENT OF JUSTICE,

July 17, 1878.

SIR: Upon the 3d instant you requested a reply to these inquiries, viz:

“1. Can both the manufacture of cigars and the sale of cigars at *retail* be lawfully carried on at the same time and in the same place?

“2. Can both the manufacture of tobacco and the sale of manufactured tobacco at *retail* be lawfully carried on at the same time and in the same place?”

Understanding the learned and experienced district judge for the district of Maryland to hold in a cause arising before

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him that the statutes permit the manufacture and retail sale of tobacco and cigars to be carried on at the same place, the subject has been carefully examined before expressing a different opinion, but such examination satisfies me that Congress did *not* intend to authorize the manufacturer of such articles to sell from broken packages at the place of manufacture, even if he should obtain a retail dealer's license.

Parties interested in the foregoing questions, having learned of their reference to me, have favored me with a copy of the able argument of counsel in the cause above mentioned and a newspaper summary of the opinion of the court. It may, perhaps, be safely assumed that these documents cite such statutory provisions as can reasonably be supposed to authorize the sale of a cigar by its maker at the place of manufacture under a retail dealer's license from a broken box. I shall briefly call your attention to each section to which mine has thus been directed.

Revised Statutes, sec. 3236, provides that "whenever more than one of the pursuits or occupations hereinafter described are carried on in the same place by the same person at the same time, except as hereinafter provided, the tax shall be paid for each according to the rates severally prescribed."

In its practical application, this language must necessarily be confined to those pursuits or occupations which can be carried on together consistently with other provisions of law. It does not confer an independent power. It only declares that each occupation shall be taxed, whether carried on alone or concurrently with some other business.

Particular emphasis is laid upon the concluding proviso of item eight of section 3244 (Rev. Stat., 627), and the newspaper report represents the distinguished judge as saying that he "could not understand how the wildest imagination could conceive of any other construction" than that it was "competent for the same person to be a manufacturer and retail dealer of cigars, &c., at the same place." That proviso is: "That no manufacturer of tobacco, snuff, or cigars shall be required to pay a special tax as dealer in manufactured tobacco and cigars for selling his own products at the place of manufacture."

That this clause contemplates a sale at the manufactory is

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evident, but it is not apparent that it necessarily implies a sale in a less quantity than a box. The idea conveyed by this language is that no dealer's tax shall be imposed upon a manufacturer for making a sale of his wares at his factory such as the other provisions of law permit him there to make. This section, like 3236, refers to the exaction of a tax, not to the conferring of an authority to sell.

The provisions required by Revised Statutes, sec. 3387, to be inserted in a manufacturer's bond—that he will not sell, &c., any cigars not stamped as required by law—while recognizing the right to sell, do not recognize the right to sell from an opened box; and the same is true as to section 3390.

These sections are all that have been cited in support of the right claimed. Let us now turn to those which have a contrary tendency. Revised Statutes, sec. 3362, declares that "all manufactured tobacco shall be *put up and prepared by the manufacturer for sale*, or removal for sale or consumption, in packages of the following description, and in no other manner." That the same person, at the same place, after having put up the manufactured article in the required packages, could immediately proceed to destroy those packages and diminish the quantity by sale of any size, however small, would hardly seem reasonable. The next section goes on to declare explicitly that "no tobacco shall be sold otherwise than in the prescribed packages," except at retail by retail dealers, &c. Section 3392 contains a similar provision as to cigars, and provides that the cigars packed as directed shall be sold or delivered "*in new boxes*," &c., not simply from such boxes.

That a *manufacturer*, as such, has no right to sell from broken packages, or less than an entire package, is conceded. It is the necessary implication from all the sections prescribing the manner in which he shall put up his wares for sale. But in the argument which has been laid before me it is said "that as retail dealer the same person may sell *out of* a stamped box as many cigars as he pleases, when as manufacturer the same person would be authorized to sell by the box only. The manufacturer sells by the box his own products to himself as retail dealer, and the dealer sells at retail out of and from this stamped box."

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This hypothesis is inadmissible. It disregards all the requisites of a contract of sale, parties, price, delivery, and reception. In the case of *Lillienthal's Tobacco v. United States* (97 U. S. Rep., 237), one of the grounds of inferring the fraud for which the plaintiff's factory was forfeited was returning as sold tobacco which had simply been removed from the workroom to the counter of the retail department. (See 5 Benedict, 113-132, for a report of this case in the court below, and for Judge Blatchford's view of the law.) One who is a manufacturer does not divest himself of that character by being licensed as a retail dealer. A sale by the maker at the place where the article is fabricated is a sale by the manufacturer, and must be of such a commodity as he can lawfully vend. The law requires the tax to be paid either when the article is sold or when it is removed for sale or for consumption. If the maker wishes to sell it at retail, he cannot sell to himself, but he can remove it from the factory for sale, and then sell it under a retail dealer's license.

That these statutes are so plain as to require no construction can hardly be said, in view of the conflict of opinion which has arisen. Such doubts as I have in this interpretation proceed from the opinion of others for whom I have sincere respect. But I have sufficient confidence in it to advise its adoption by your Department until overthrown by the decision of the court of last resort.

I answer both of your inquiries negatively.

The papers forwarded by you are herewith returned.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. JOHN SHERMAN,

Secretary of the Treasury.

FUEL FOR ARMY OFFICERS.

The provisions of section 8 of the act of June 18, 1878, chap. 263, giving to Army officers the privilege of purchasing fuel at the rate of \$3 per cord for standard oak wood, do not extend to retired officers of the Army.

The words in that section, "or at an equivalent rate for other kinds of fuel, according to the regulations now in existence," are to be understood

Fuel for Army Officers.

as only authorizing a sale of the quantity of other fuel for \$3 (viz, 1,500 pounds of anthracite coal or 30 bushels of bituminous coal), which, by the regulations, is made the equivalent of a cord of standard oak wood.

DEPARTMENT OF JUSTICE,

July 18, 1878.

SIR: Your letter of the 12th instant inquires whether by section 8 of the act approved June 18, 1878, entitled "An act making appropriations for the support of the Army for the fiscal year ending June 30, 1879, and for other purposes," the Quartermaster's Department is authorized to sell fuel to retired officers of the Army, or whether the privilege of purchasing was intended by the law to be confined to such officers as were previously entitled to certain allowances for fuel and quarters, which the act operates to modify.

You also inquire as to the meaning of the words in this section "equivalent rates;" whether it is thereby intended that coal may be sold at a price bearing the same relation to its market or contract value as \$3 per cord does to market or contract price of wood, or whether the language of the act implies that the quantity of coal fixed by regulations as the equivalent of a cord of wood in the gratuitous allowance to officers under pre-existing law is to be the only quantity that is to be sold for the sum of \$3, irrespective of any fluctuation in the contract price of coal.

In answer to your first inquiry, I am of opinion that the section in question does not authorize sales of fuel to retired officers of the Army. An examination of its provisions shows that it does not relate to them, but to those Army officers who have been heretofore entitled to allowance of fuel. This allowance is for the future prohibited, and the privilege accorded of purchasing fuel at the rate of \$3 per cord for standard oak wood is designed as a compensation in some degree for the withdrawal of the allowance of fuel heretofore furnished to them. As retired officers not on active duty have never been entitled to this allowance, a provision intended to compensate for the withdrawal of such allowance cannot be construed as extending to them.

In answer to your second question, I would say that the construction that Congress intended to permit the sale of

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other kinds of fuel at prices bearing the same proportion to the respective market prices of these other kinds as \$3 per cord would bear to the current market price of oak wood would perhaps be admissible were it not for the distinct reference to the regulations now in existence. By the regulations, as they stand at present, coal at the rate of 1,500 pounds anthracite, or 30 bushels bituminous, is furnished in lieu of a cord of hard wood. The cord of hard wood is made the standard by which other grades of fuel are tested. In view of this provision of the regulations, I am of opinion that the words "or at an equivalent rate for other kinds of fuel, according to the regulations now in existence," must be construed as only authorizing the Quartermaster's Department to furnish the quantity of other fuel for \$3, which, by the regulations, is made the equivalent of a cord of standard oak wood.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. GEORGE W. McCrARY,
Secretary of War.

ATTORNEY-GENERAL.

In order that the Attorney-General may advise the Treasury Department, as contemplated in the act of March 3, 1875, chap. 136, all the facts upon which the question turns should be stated and presented for his consideration.

DEPARTMENT OF JUSTICE,
July 18, 1878.

SIR: Your letter of the 5th ultimo informs me that the Department has under consideration an appeal of C. L. Tiffany from the assessment by the collector at the port of New York of a duty of 50 per cent. ad valorem on an importation of perforated pearls.

The decision of the collector was made on the return of the appraiser, who classified the importation in question as beads, under schedule M of section 2504 of the Revised Statutes, a reproduction in part of section 12 of the tariff act of June 30, 1864, which imposes a duty of 50 per cent. ad valorem on "all beads and bead ornaments except amber."

Attorney-General.

In the same schedule "diamonds, cameos, mosaics, gems, pearls, rubies, and other precious stones" are made dutiable at 10 per cent. ad valorem "when not set"; when set, at 25 per cent. ad valorem. This is also a reproduction of section 3, act of June 30, 1864.

It appears that the Treasury Department has held, by decision dated June 20, 1876, that the provision for "pearls not set" applied only to pearls when not perforated or strung, and that when perforated or strung, so that in fact they are in the condition of beads or bead necklaces, they fell within the provision for "all beads and bead ornaments except amber."

Your letter requests an opinion upon the question whether pearls not set are entitled to be entered at a duty of 10 per cent. irrespective of the uses or purposes for which they may be intended, and, if so, whether I recommend a reversal by the Treasury Department of its decision heretofore made subjecting them to the payment of a duty of 50 per cent. ad valorem as beads.

It is not possible for the Attorney-General to advise the Treasury Department, as contemplated in the act of 1875 (18 Stat., 469), unless all the facts upon which the question turns shall have been stated for his consideration. For example: Are pearls when perforated known in commerce as beads? Does the Secretary accept Mr. Tiffany's statement of facts as correct, and is it intended that such statement shall be relied upon by the Attorney-General in making up a judgment?

The question whether a perforated pearl is a pearl or a bead within the tariff acts is one of mixed law and fact, which the Attorney-General is not competent to decide unless it be agreed what the commercial designation of the article is. Commercial designation is a matter of fact. If Mr. Tiffany's statements of fact transmitted by the Secretary are correct, perforated pearls are not beads within the act.

It seems to me also that the rare value of pearls is a circumstance tending to the same result, and requiring that for tariff purposes they should remain with other articles *ejusdem generis* as to value, namely, precious stones, diamonds, &c. Their value is peculiar, and no matter what changes of form are undergone by them, that circumstance continues to be

Security from Depositaries of Public Money.

the one which distinguishes them as of the class of precious stones, diamonds, &c. Nothing done to them adds essentially to their value.

If, therefore, I am to consider that pearls when perforated are not known in commerce as beads, and that the statement of Mr. Tiffany in regard to them is to be accepted as correct, I should recommend a reversal by the Department of its decisions heretofore made subjecting them to the payment of a duty of 50 per cent. ad valorem as beads.

I return, at your request, the argument of Mr. Tiffany's counsel.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. JOHN SHERMAN,
Secretary of the Treasury.

SECURITY FROM DEPOSITARIES OF PUBLIC MONEY.

The Secretary of the Treasury has authority, under section 5153 Rev. Stat., to receive from national banking associations designated as depositaries of public money Treasury notes of the United States as security for the safe keeping and prompt payment of the public money deposited with them and for the faithful performance of their duties as financial agents of the Government.

DEPARTMENT OF JUSTICE,

July 18, 1878.

SIR: Your letter of the 16th instant suggests the inquiry whether under section 5153 of the Revised Statutes it is within the discretion of the Secretary of the Treasury to receive from national banking associations designated as depositaries of public money a deposit of United States notes to secure the safe keeping and prompt payment of the public money held by them.

The section in question, after providing that "all national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, except receipts from customs, under such regulations as may be prescribed by the Secretary," and that "they may also be employed as financial agents of the Government," contains

Repayment of Duties.

the following clause: "The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safe keeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government."

In my opinion, the words "and otherwise" will permit the Secretary of the Treasury to receive as collateral security from such national banking associations money securities of the United States of the same general character as its bonds, and will permit the Secretary therefore to receive Treasury notes of the United States as collateral security for the performance of the obligations of such association.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. JOHN SHERMAN,
Secretary of the Treasury.

REPAYMENT OF DUTIES.

The terms "interest and costs in judgment cases," as employed in section 3 of the act of June 14, 1878, chap. 191, making an appropriation for the payment of certain claims originating prior to July 1, 1875, comprehend cases of suits discontinued agreeably to instructions of the Secretary of the Treasury, coming within the decisions of the Supreme Court, where the plaintiffs would have been entitled to judgments with interest and costs. In such cases interest and costs are authorized to be paid from said appropriation.

DEPARTMENT OF JUSTICE,

July 18, 1878.

SIR: In the act approved June 14, 1878, an appropriation is made for payment of claims originating prior to July 1, 1875, as follows:

"For repayment to importers the excess of deposits for unascertained duties, or duties or other moneys paid under protest, including interest and costs in judgment cases, two hundred and fifty thousand dollars: *Provided*, That no portion of this appropriation shall be expended for the payment of claims known as the 'charges and commission cases.'"

Under the recent decisions of the Supreme Court in various

Repayment of Duties.

cases involving the rates of duty on imports which were decided adversely to the claims of the Government, instructions had, prior to the passage of the act in question, been given to the collectors at the various ports to prepare and forward papers for the repayment of the principal, on discontinuance of the suits covering the question, and such collectors were also instructed to forward the necessary papers for repayment of accrued interest and costs, whenever an appropriation should be made available for the purpose.

The question now presented is, whether under the appropriation mentioned the Treasury Department can properly pay interest and costs in suits in which no formal judgment has been entered.

The cases have been discontinued of record in accordance with the instructions given to the collectors, and certified statements for interest and costs are now in the Treasury Department awaiting such disposition as shall be thought proper under this appropriation.

So strict a construction should not be given to this statute as to include in the term "judgment cases" only those in which judgments were actually rendered. The parties sued were collectors and other private persons, and if liable at all were liable not only for the amount of duty erroneously exacted, but for interest thereon and the costs of the proceedings. When, therefore, a discontinuance was made to await an appropriation, &c., if the minute upon the record had been formally made it would be a "judgment case" within the policy and words of the statute quoted, because the object which Congress had in view was to indemnify officers of the United States against the judgments and orders to pay covering such items. As Congress well knew that any judgment for duties erroneously exacted would carry interest and costs, it must be presumed that it intended to pay such interest and costs in all cases where the Government was in such a position that a judgment might at once be rendered, which judgment would include interest and costs.

I am therefore of opinion that in cases discontinued by order of the Secretary of the Treasury coming within the decisions of the Supreme Court, where the party plaintiff would have been entitled to a judgment for the amount of

Compensation of District Attorney.

duty, and for interest and costs, the Secretary of the Treasury is justified in treating them as included within the term "judgment cases" in the act in question, and therefore in paying such interest and costs.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. JOHN SHERMAN,

Secretary of the Treasury.

COMPENSATION OF DISTRICT ATTORNEY.

In general, the official duty of a district attorney does not require him to attend to suits in State courts, although the United States may be directly interested therein; and where he appears in those courts (except in certain cases—see section 771 Rev. Stat.) his appearance there must be pursuant to the previous direction, or receive the subsequent approval, of the Attorney-General, to entitle him to compensation from the Government for such service.

The compensation of a district attorney for such service is in all cases regulated by section 299 Rev. Stat., with only this exception, that where he has appeared by direction of the Secretary or Solicitor of the Treasury in a suit against a revenue officer, his compensation therefor is regulated by section 827 Rev. Stat.

It is contemplated by section 299 that, where no fees are provided by law to which the compensation of a district attorney in respect to any part of his services can be assimilated, a fair and reasonable compensation for such part of his services shall be made.

Compensation allowed a district attorney under section 299 should be included in the semi-annual return required from him by section 233 Rev. Stat.

DEPARTMENT OF JUSTICE,

July 19, 1878.

SIR: By your letter of the 18th ultimo, which inclosed an account against the United States in favor of George M. Duskine, esq., district attorney for the southern district of Alabama, for professional services in the case of *The Deposit Savings Association of Mobile v. D. H. Marks & Co. et al.*, amounting to \$1,000, my opinion is asked as to the propriety of allowing and paying this account; and I am also requested, in case the account shall be considered proper, but its certification by the Attorney-General shall be deemed a prerequisite to its payment, to certify the same.

Compensation of District Attorney.

That case was a suit brought by the said association to recover back certain real property (consisting of a bank building with the ground belonging thereto) situated in the city of Mobile, which had previously been sold for taxes under a warrant of distrain by the collector of internal revenue. At the sale the property was bid in for the United States, and afterwards rented to the defendants, who, at the commencement of the suit, were in possession thereof as tenants of the United States.

In this suit the United States were interested, for the reason that it involved their title to the premises. The proceedings were originally instituted in one of the courts of the State, and the district attorney appeared there in compliance with a request of the Commissioner of Internal Revenue dated November 18, 1875, to resist them. He subsequently obtained a removal of the cause into the United States circuit court, where at a recent term judgment went in favor of the defendants. The account of the district attorney covers his services both in the State court and in the circuit court of the United States, and it appears to have been rendered to and approved by the latter court agreeably to the requirements of the act of February 22, 1875.

I observe that the communication of the First Comptroller, which accompanied your letter, suggests the following questions in connection with this account :

“1. Was the service performed within the line of a district attorney’s official duty ?

“2. If so, is the compensation restricted by section 299 of the Revised Statutes ?

“3. If not a prescribed official duty, can Mr. Duskin’s services be paid for by the Secretary of the Treasury upon the certificate of the court ?”

These points have not been overlooked in the consideration of the inquiry submitted by you.

In general, suits in State courts, although the United States may be directly interested therein, do not fall within the official duty of a district attorney to attend to; and the present case formed no exception to this rule. Where that officer appears in any of those courts (unless it be in behalf of the defendant in a suit or proceeding pending in his dis-

Compensation of District Attorney.

trict against a revenue officer for acts done by, or for the recovery of money exacted by or paid to, the latter—see section 771 Revised Statutes) his appearance there must be pursuant to the previous direction, or receive the subsequent approval, of the head of this Department, to entitle him to compensation from the Government for such service. Formerly it was competent to the head of any of the Executive Departments to employ a district attorney in these extra-official cases, or, if he thought it expedient to do so, to retain other counsel; and under the act of February 26, 1853, a district attorney so employed, as well as other counsel, was entitled to receive for his services such sum as might be stipulated or agreed on. But the authority of the various heads of Departments thus to employ counsel at the expense of the United States was taken away by the act of June 22, 1870 (see section 189 Revised Statutes), and it was provided that this power should thereafter be exercised solely by the Attorney-General, though as the law now stands the Secretary of the Treasury would seem to be still invested with authority to give directions and instructions to district attorneys touching suits or proceedings against revenue officers. (See sections 827 and 771 Revised Statutes.) The result is that the approval of the account of Mr. Duskin by the Attorney-General becomes a prerequisite to its allowance.

It is asked whether the compensation of a district attorney in a case like the one under consideration is regulated by section 299 of the Revised Statutes. I am of the opinion that this section applies to the account of a district attorney for his services in such a case. It in terms extends to accounts of that officer for services in any case, whether the suit be brought in a State court or in a United States court, when the Government is interested in such case, but is not a party of record, and also to his accounts for services in cases instituted (whether in a State or in a United States court) against officers or agents of the Government for acts committed or omitted in the lawful discharge of their duties. The only exception from its provisions are accounts for services in suits against revenue officers wherein a district attorney has appeared by direction of the Secretary or Solicitor of the Treasury; the compensation of the district attorney in these

Compensation of District Attorney.

last mentioned cases being regulated by section 827 Revised Statutes.

By section 299 the compensation of a district attorney for services like those embraced in the account of Mr. Duskin must be assimilated as near as may be to the fees provided by law for similar services in cases in which the United States is a party. Where no fees are thus provided, to which the compensation of the district attorney in respect to any particular part of his services can be assimilated, it must be deemed to be contemplated by this provision that a fair and reasonable allowance for such part of his services shall be made by the head of the proper Department. It does not appear that Mr. Duskin's account has been made out in conformity to the requirements of that section, and, until this appears, the question of the propriety of allowing and paying it admits, in my opinion, of no other than a negative answer.

Therefore, while I fully sanction and ratify the act of the Commissioner of Internal Revenue in retaining Mr. Duskin in the case referred to so far as to cure the irregularity of his employment therein, I do not feel authorized to certify or approve the account now rendered by him for his services in that case. That account should be returned to him with directions to restate it in accordance with the provisions of section 299, and then to render it to the court for approval as required by the act of 1875; after which it will be proper for him to return it, to the end that it may be "audited and allowed as in other cases."

I may add that the compensation or fees to which District Attorney Duskin may be entitled in the case under consideration are by section 834 of the Revised Statutes to be included in the semi-annual return required of him by the preceding section—such case appearing to be one in which the United States would be bound by the judgment rendered therein.

I return the papers which were received with your letter.

Very respectfully, your obedient servant,

CHAS. DEVENS.

HON. JOHN SHERMAN,

Secretary of the Treasury.

Repayment of Tonnage Tax.

REPAYMENT OF TONNAGE TAX.

The Secretary of the Treasury is not authorized by the provisions of the act of June 19, 1878, chap. 318, and of section 3012 Rev. Stat., to pay interest on the amounts exacted as tonnage tax, in contravention of treaty provisions, from steamers of the Norse American Line and of the North German Lloyd's Line.

DEPARTMENT OF JUSTICE,
July 19, 1878.

SIR: In addition to questions submitted relating to claims by citizens of the Hanseatic Republics and subjects of Norway and Sweden for repayment of tonnage tax under the act of June 19, 1877, your letter of the 15th instant inquires whether, by virtue of the stipulations of the treaties upon which the claims in question were based, claims for interest on the sums exacted as tonnage tax in contravention of treaty provisions from steamers of the Norse American Line and of the North German Lloyd's Line should be paid by the United States, and if such claims for interest are valid and payable, whether the Secretary of the Treasury is authorized under the provisions of the act of June 19, 1878, to refund interest on the amounts of tonnage tax so exacted by the United States in contravention of treaty stipulations of the steamers of the lines mentioned.

Provision for payment of these claims is specific, namely, by sec. 3012 of the Revised Statutes. The question whether interest is payable upon them is involved in the question whether such would be the usual course of administration under that section. I understand that interest is not payable according to the ordinary course of administration upon the refunding of duties by authority of that section which have been improperly collected. This seems to be a correct construction of the statute as a matter of law. And it being the only practical question involved in the letter, I respectfully reply that the Secretary of the Treasury is not authorized to refund interest on amounts of tonnage tax exacted by the United States in contravention of treaty stipulations. Whether or not interest should be allowed as a matter of international justice and propriety upon these claims is not a question upon which it is necessary for me to express any

Case of Paymaster Rodney.

opinion. If such claim exists, it must be made to Congress. The only inquiry I have to answer is purely a domestic one, namely, as to the administration of the law as it at present exists.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. JOHN SHERMAN,

Secretary of the Treasury.

CASE OF PAYMASTER RODNEY.

Where a naval retiring board, convened to inquire into the nature and cause of the disability of an officer, has once finished its work, rendered a complete judgment in the case, and adjourned, a subsequent reconsideration of its judgment by the board, unless authorized or directed by proper authority, can have no legal effect.

Accordingly, upon examination of the record of the proceedings before a naval retiring board, in the case of Paymaster Rodney, held that the paper attached to the record, called a reconsideration of the finding of the board, was without legal effect, and that that officer was properly retired, under the original finding of the board, on furlough pay.

DEPARTMENT OF JUSTICE,

July 25, 1878.

SIR: Your letter of the 2d instant, calling my attention to certain opinions heretofore delivered in the case of Paymaster Rodney, informs me that it has recently been discovered that the board by which Mr. Rodney was retired reconsidered their finding prior to the action of the President on the proceedings, and that there is good reason to believe that this reconsideration was overlooked by the Secretary of the Navy in submitting the record for the action of the President. It also suggests that my own opinion as to the status of Mr. Rodney was based upon the finding of the board before its reconsideration and the action of the President thereon.

Before proceeding to answer the questions with which your letter concludes, I have carefully examined the record in order to ascertain whether or not there is evidence in it from which it is legally to be inferred that there was a reconsideration by the board of its original judgment under such circumstances that it had authority to reconsider. If it had once

Case of Paymaster Rodney.

finished its work, rendered a complete judgment, and adjourned, a subsequent reconsideration by the board could not have any legal effect.

On examining the record, it appears that on Tuesday, June 27, 1871, the board met, and a record was made in which the board stated that they were "unable to trace the naval incompetency of Paymaster Rodney to any special cause, but believe it to be inherent, and therefore can only recommend that he be removed from the active list of the officers of the Navy for his misdeeds"; that they then took a recess and met again to authenticate by their signatures their record and finding in the case. This record is signed by the various members of the board. To it, in immediate conjunction, are appended these words:

"The board having completed the investigation referred to them, adjourned to await the further orders of the Department.

"ANDW. A. HARWOOD,
"R. Adm'l & Judge-Advocate, U. S. N."

Some forty pages after is a paper which bears the same date with the original sentence, and recites that "at the entreaties and representations of the medical officers of the board we finally reconsider that part of the finding in Paymaster Rodney's case relating to cause," and then proceeds to attribute the cause of Mr. Rodney's conduct to an exposure unavoidably incident to the service. This paper is signed by all the members of the board.

Under these circumstances, I am of opinion that the latter paper cannot be treated as a reconsideration which the board had any right to make. The original sentence is complete, and terminates by adjournment. If this is correct, the board had finished its work, and was not entitled again to meet for the purpose of reconsidering its judgment. If it assumed to do so and did then reconsider, such reconsideration would have no legal effect. Although the paper called a reconsideration bears the same date with the original sentence, yet its position among the papers and its own language indicate that it was a subsequent act. It is not to be questioned, of course, that if a board agree upon a particular sentence, and,

Court-Martial—Accuser or Prosecutor.

before recording it and adjourning, determine upon another sentence, they may properly do so; but the record in this case indicates that the first sentence was complete and that the adjournment was made before any reconsideration took place. I therefore am of opinion that the board was not entitled to reconsider the adjudication which it had made, unless such reconsideration was authorized or directed by the proper authority.

It is to be observed also, in considering these questions, that when this matter was originally before the President of the United States all the facts connected with the so-called reconsideration might and should have been known to him and the then Secretary of the Navy. It was either treated by them as a subsequent act, which had no vitality because the power of the board had been exhausted, or else it was overlooked by the then Secretary of the Navy and President in passing upon the proceedings. I deem the former of these suppositions the more probable.

In reply, then, more directly to the questions with which your letter closes, I would say that upon the papers as they stand Paymaster Rodney was properly retired under the finding of the board on furlough pay, that the paper called a reconsideration could not operate to annul the effect of the completed act which the board had already done, and that the present Executive should not review the action of his predecessor upon the ground that he overlooked the finding of the board made upon reconsideration.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. R. W. THOMPSON,
Secretary of the Navy.

COURT-MARTIAL—ACCUSER OR PROSECUTOR.

Where the record of a trial before a court-martial is defective, in failing to show who was the originator or signer of the charges against the accused, and who is to be treated legally as the accuser or prosecutor, evidence *aliunde* is admissible to supply the information.

A commander of division who, upon information laid before him of grave misconduct on the part of a regimental officer in his command, directed

Court-Martial—Accuser or Prosecutor.

the colonel of the regiment (from whom the information was received) to prefer charges against the alleged offender, and who saw that the charges were put in proper form, and to that extent superintended their preparation, cannot be deemed the accuser or prosecutor of such alleged offender in the sense of the act of December 24, 1861, chap. 3 (section 1342 Rev. Stat., article 73).

DEPARTMENT OF JUSTICE,

August 1, 1878.

SIR: By your letter of May 9 last, it appears that Col. Charles G. Chandler, of the Tenth Vermont Volunteers, was in December, 1864, tried by a general court-martial convened by order of Brig. Gen. Truman Seymour, commanding the third division of the Sixth Army Corps, near Kernstown, in the State of Virginia, and having been convicted of misbehavior before the enemy near Cedar Creek, in Virginia, and of other military offenses, was sentenced "to be dishonorably discharged the service of the United States," &c. The sentence, with the proceedings and findings of the court, were approved by General Seymour, and afterwards confirmed on December 2, 1864, by Maj. Gen. Philip Sheridan, commanding the middle military division, and from that date Colonel Chandler ceased to belong to the military service of the United States.

There has been presented to the Department an application to have these proceedings declared null and void, upon the ground that General Seymour preferred the charges, and therefore, as accuser and prosecutor, was legally incompetent to constitute the court. In support of the application, affidavits have been submitted, the substance of which is that General Seymour, having been informed that Chandler had committed the misbehavior for which he was tried, directed that charges should be preferred against him, and that the charges were signed by Col. William W. Henry, who commanded the regiment of which the accused was lieutenant-colonel, and who states that the same were framed at the dictation of General Seymour, who afterwards corrected their wording before the signing of them.

The record of the trial is defective in failing to show who signed the charges, or who was the actual originator of them. It does not appear from it that General Seymour had any

Court-Martial—Accuser or Prosecutor.

personal knowledge of, or immediate personal relation to, the subject-matter of the charges. It does, however, affirmatively appear by the record that Colonel Henry (who now states that he signed the charges at the command of General Seymour) deposed to the truth of the charges of his own personal knowledge at the trial. The record being thus defective, who was the originator of the charges, and who is to be treated legally as the accuser or prosecutor, must depend upon such evidence as is furnished *aliunde* by the affiants. General Seymour himself states, in answer to a note not furnished the Department: "I was very particular, under all circumstances, that my staff should not assume my own responsibilities, and that I should be kept in constant information as to every duty that was being performed. It would not have been possible, I think, for an officer of Lieutenant. Colonel Chandler's rank to have been tried within the limits of my jurisdiction and command without at least my full approval of every act of any staff officer of mine who had to do with the case. And therefore I have no sort of doubt but that Colonel Damon's statement is perfectly correct, and that the charges were drawn and preferred against Chandler by my express command."

From Damon's statement it further appears that General Seymour had been informed at the conclusion of the action at Cedar Creek that Colonel Chandler had gravely misbehaved himself therein, and that it was his direction that charges should be preferred against him upon such information.

Assuming the facts to be as stated by the affiants, the questions presented by your letter are:

1st. Whether the action of General Seymour constituted him the accuser or prosecutor in the sense of the act of Congress approved December 24, 1861, chap. 3 (12 Stat., 330, 331), now the seventy-third Article of War.

2d. Can the sworn statements of Colonel Henry and others, above mentioned, be now admitted to impeach the regularity and validity of the proceedings of the court?

3d. If these questions should be answered affirmatively, what relief in the case, if any, can the Executive now afford?

I answer the second of these inquiries by saying that in

Court-Martial—Accuser or Prosecutor.

my opinion the sworn statements of Henry and others may be now admitted, in order, not to impeach the validity of the proceedings, but to supply facts which the record fails to show.

The vital inquiry is the first contained in your letter—whether upon the facts as they now appear General Seymour is to be treated as the accuser or prosecutor in the sense of the seventy-third Article of War.

In a certain sense the commanding general is the prosecutor in nearly every case that comes before a military court within the limits of his command; for in almost every case charges are submitted to his examination, approval, and, if necessary, amendment, and there is always an informal preliminary adjudication by him to determine that the case is one which is proper for trial by a court-martial before he orders the court-martial, and the accused to appear before it. It is quite apparent that in such case he is not an accuser or prosecutor in the sense of the article of war. Nor can he be so considered when information is laid before him of grave misconduct upon the part of an officer in his command, which information he deems to be reliable, and he then orders the judge-advocate of the division, or the colonel commanding the regiment of the accused (from whom it would appear in the present case he received his information, and who subsequently testified to the same facts), to proceed to bring the alleged offender before a court-martial. This is a part of the necessary supervision which he must exercise over his command in order to preserve its proper discipline. If he would not be treated as accuser or prosecutor if the charges had first been written out by the colonel of the regiment and submitted to him with a request that a court-martial should be ordered to investigate them, so he cannot be considered as the accuser or prosecutor when the charges are made to him orally by such officer, and upon hearing the information he directs that charges should be preferred and the alleged offender tried. He does not alter his position as commanding officer and become accuser or prosecutor in the sense of the seventy-third Article of War, because he himself sees that the charges are in proper and definite legal form, and to that extent superintends their preparation. In the pres-

 Claims for Army Supplies.

ent case the charges were not actually signed by General Seymour. He had no personal relation to, or knowledge of, the matter out of which the charges grew, so as to have created in him any personal feeling or interest in the conviction of the prisoner. In considering alike the question of the propriety of a court-martial and the preferment of charges, he dealt with the matter, as a commanding officer must deal in a larger number of instances, upon the statements and allegations of others, and decided the matter in his own mind no further than to pronounce that upon the information before him the alleged offender should be brought before a court-martial.

Under the circumstances, I am of opinion that the proceedings cannot be declared null upon any ground which treats General Seymour as the accuser or prosecutor.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. GEORGE W. MCCRARY,

Secretary of War.

 CLAIMS FOR ARMY SUPPLIES.

In August, 1864, a commissary of subsistence received from P., at Barrancas, Florida, sixteen head of beef cattle for the use of the Army, and gave him a receipt therefor, which concluded as follows: "The owner of said stores will be entitled to be paid for the same after the suppression of the rebellion, upon proof that he has from this date conducted himself as a loyal citizen of the United States, and has not given aid or comfort to the rebels." *Held* that the accounting officers of the Treasury have no authority to audit and settle a claim for said cattle. Claims of this character are cognizable only by the Southern Claims Commission, created under the act of March 3, 1871, chap. 116.

DEPARTMENT OF JUSTICE,

August 1, 1878.

SIR: Your letter of December 22, 1877, submits, in accordance with a request from the Second Comptroller of the Treasury, a certain statement of facts in relation to a claim of Peter Palmes, now pending before the Treasury Department, and requests my opinion upon the questions of law arising thereon.

Claims for Army Supplies.

It appears that on August 28, 1864, at Barrancas, in the State of Florida, Capt. C. H. Hurbert, a commissary of subsistence, U. S. A., received from the said Peter Palmes sixteen head of beef cattle for the use of the Army, and at that date made and delivered to said Palmes a receipt for said property, which, after reciting the number of cattle taken, concluded as follows :

“The owner of said stores will be entitled to be paid for the same after the suppression of the rebellion upon proof that he has from this date conducted himself as a loyal citizen of the United States, and has not given aid or comfort to the rebels.”

The receipt was signed by Hurbert as commissary of subsistence.

The first question proposed by you is: “Have the accounting officers of the Treasury authority or jurisdiction to audit, certify, or settle the claim referred to in the said receipt of the commissary of subsistence?”

If this question should be answered in the negative, the other inquiries would be at present superfluous.

Claims of this nature were frequent during the war, where supplies were taken from time to time by officers of the subsistence department of the Army, but no means existed of auditing, certifying, or settling the same by the accounting officers. The commissaries themselves, as it is understood, were in the habit of declining to pay under such certificates. Under these circumstances Congress passed the act of July 4, 1864, the third section of which is as follows :

“That all claims of loyal citizens in States not in rebellion, for subsistence actually furnished to said Army, and receipted for by the proper officer receiving the same, or which may have been taken by such officers without giving such receipt, may be submitted to the Commissary-General of Subsistence, accompanied with such proof as each claimant may have to offer; and it shall be the duty of the Commissary-General of Subsistence to cause each claim to be examined, and, if convinced that it is just, and of the loyalty of the claimant, and that the stores have been actually received or taken for the use of, and used by, said Army, then to report each case for

Claims for Army Supplies.

payment to the Third Auditor of the Treasury, with a recommendation for settlement."

The provisions of this act, which by its terms were confined to citizens of States not in rebellion (the State of Florida being in rebellion), were extended July 28, 1866, to loyal citizens of the State of Tennessee, and by joint resolution of June 18, 1866, to loyal citizens of the counties of Berkeley and Jefferson, in the State of West Virginia.

March 3, 1871, in the act making appropriations for the Army and other purposes, section second provided for the appointment by the President of a board of commissioners, to be designated as "Commissioners of Claims," to be commissioned for two years, whose duty it should be to receive, examine, and consider the justice and validity of such claims as should be brought before them of those citizens who remained loyal adherents to the cause and Government of the United States during the war, for supplies taken or furnished during the rebellion for the use of the Army of the United States in States proclaimed as in insurrection against the United States.

The provision made therein by Congress for claims of this nature—namely, of loyal citizens residing in States which were declared to be in insurrection—was by filing the same before the board of commissioners provided for by the act just cited, usually known as the "Southern Claims Commission." This act covered the case of Peter Palmes, as it is now alleged to exist. The authority given by the act of July 4, 1864, to the accounting officers was never extended to claims of loyal citizens residing in insurrectionary States.

I am therefore of opinion that no power exists in the accounting officers to audit, certify, or settle the claim referred to in the receipt of the commissary of subsistence given to Peter Palmes. This reply, as before suggested, renders a reply to the subsequent questions contained in your letter unnecessary.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. JOHN SHERMAN,

Secretary of the Treasury.

Officers and Soldiers—their pay as Witnesses.

OFFICERS AND SOLDIERS—THEIR PAY AS WITNESSES.

Army officers and soldiers, where they are sent away to attend as witnesses for the Government in any of the United States courts, are entitled, under section 850 Rev. Stat., to receive their *necessary expenses* in going, returning, and attendance on the court, which must be stated in items and sworn to. They are not, in such case, entitled to *mileage* or *witness fees*.

DEPARTMENT OF JUSTICE,

August 2, 1878.

SIR: Your letter of June 15, 1878, submits to me, for such action or suggestions as I may deem proper, a communication from the Quartermaster-General in reference to the inadequacy of the compensation allowed by law to witnesses before the courts of the United States to defray the necessary expenses of officers and soldiers on duty in the Territories who are frequently obliged to attend in that capacity.

In my opinion officers and soldiers may be paid the necessary expenses of their attendance as witnesses for the Government under section 850 of the Revised Statutes. This section is as follows:

“When any clerk or other officer of the United States is sent away from his place of business as a witness for the Government, his necessary expenses, stated in items and sworn to, in going, returning, and attendance on the court, shall be audited and paid; but no mileage or other compensation in addition to his salary shall in any case be allowed.”

The word “officer” in this section is to receive a liberal construction. It does not import an officer as distinguished from a soldier, but any person who is an employé, or is in the service, of the United States, in however humble a capacity.

Whenever, therefore, a soldier appears as a witness for the Government before any court of the United States, he is entitled to receive his necessary expenses in going, returning, and attendance on the court, which, it will be observed, are to be stated in items and sworn to; but he will not be entitled in such case to receive any mileage or witness fees, as he will

Use of Bridges, Roads, etc., in Montana.

continue to receive pay for his ordinary services as an official of the United States.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. GEORGE W. McCrARY,

Secretary of War.

USE OF BRIDGES, ROADS, ETC., IN MONTANA.

Corporations formed under a general law of the Territory of Montana, dated December 13, 1867, for the purpose of constructing and maintaining bridges, roads, or ferries, come within the scope of the provision in the first section of the act of March 2, 1867, chap. 150, authorizing the Territorial legislatures, by general incorporation acts, to permit persons to associate themselves together as bodies corporate for "industrial pursuits."

In granting to such corporations the privilege of locating their bridges, roads, &c., upon the public lands of the United States, the Territory must be deemed to have acted within the limits of the authority thus given by Congress.

Where the bridges, roads, &c., so located are used by the Government for the passage of troops, animals, and supplies, the owners thereof are entitled to a reasonable compensation for such use. The compensation is not necessarily to be the tolls fixed by the owners or the local authorities.

DEPARTMENT OF JUSTICE,

August 2, 1878.

SIR: Your letter of June 15, 1878, presents the question, at the request of the Quartermaster-General, whether the United States are legally liable to pay tolls for the passage of their troops, animals, and supplies over the bridges, roads, and ferries of corporations chartered by the Territorial legislature of Montana, a list of which, with their date of incorporation, is appended. This inquiry is especially made where such roads, ferries, and bridges are established upon the public lands of the United States.

By an act of Congress of March 2, 1867, entitled "An act amendatory of 'An act to provide a temporary government for the Territory of Montana,'" it is provided "That the legislative assemblies of the several Territories of the United States shall not, after the passage of this act, grant private

Use of Bridges, Roads, etc., in Montana.

charters or special privileges, but they may, by general incorporation acts, permit persons to associate themselves together as bodies corporate for mining, manufacturing, and other industrial pursuits."

The corporations in question were formed under an act of the Territory of Montana approved December 13, 1867. No narrow construction is to be given to the words "industrial pursuits." A corporation formed for the purpose of building a bridge or maintaining a road or ferry may properly be included within those which are described in the section above quoted.

In regard to the right of States to authorize roads or bridges through the lands of the United States, it was held by Mr. Justice McLean, in the case of *The United States v. The Railroad Bridge Company* (6 McLean, 517), that every State might, by virtue of its power as such, make public roads through the lands of the United States, the lands being such as were held by the United States as its property and as a portion of the public domain, and not such as were held for purposes of its sovereignty, as for forts, arsenals, reservations, and other similar purposes. This decision rests upon the ground that the States are sovereign, and when once admitted to the Union, Congress has fully recognized their sovereignty. The proprietorship of land within the limits of a State by the General Government does not enlarge its own sovereignty or restrict that of the State.

The rights of a Territory in regard to the public lands within its limits cannot be held to be so extensive as those of a State. A Territory is not properly sovereign. It is an organization through and by means of which Congress for a time governs a particular portion of the country. Its rights are those which are set forth in the organic act. Its limits are liable to be altered and changed from time to time, as it may be convenient to either add to or diminish its boundaries. But it has the power of legislation, subject to the control of Congress, and when acting within the limits which Congress has fixed for it, it acts by the authority of Congress.

In granting charters to the corporations in question, the Territory of Montana must be deemed to have acted by virtue of the authority given it by the organic act; and in giving

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CORRECTION OF PATENT.

to these various companies the privilege of running their roads or building their bridges within the public lands of the United States, it must be held to have done so by authority of Congress, which at any time could have interfered and repealed such statutes, either because they were in conflict with the organic act or because they were not in their nature satisfactory to Congress.

Such being the legislation under which these acts of incorporation were granted and the authority given to these turnpike roads to pass through the public lands of the United States, when the structures which they have made are used by the Army for its purposes there is no reason why proper compensation should not be paid to their owners.

It is not intended by this to suggest that the tolls are necessarily to be those which either the corporations in question or the local authorities may determine. When structures which have been erected upon the public lands permissively are used by the Government, it is just that the owners should be fairly compensated for that use. They are not entitled to more than this, nor are the United States to be compelled to pay unreasonable tolls.

In answer to your question, I would reply, then, that while tolls *eo nomine* need not be paid to the owners of roads, ferries, or bridges constructed over the lands of the United States within the limits of the Territory of Montana, yet such owners are entitled to a reasonable compensation for the use when the structures erected by them are used for the passage of troops, animals, and supplies of the United States.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. GEORGE W. MCCRARY,
Secretary of War.

CORRECTION OF PATENT.

Where a patent was issued to B., J., and L. jointly, in conformity to their application as joint inventors, when in fact the device patented was not the joint invention of all of the applicants, but the sole invention of B., the others (J. and L.) being his assignees only: *Held* that it is not within the power of the Interior Department to correct the patent

Correction of Patent.

thus issued so as to show that B. was the inventor of the device and that J. and L. are the assignees thereof.

The patent issued upon such application being void, the Department cannot, by means of alterations or corrections, impart validity thereto.

The parties interested can file a new application in a case of that sort, which, if seasonably done, may be made the basis for the issue of a new patent; but the latter will not retroact by way of confirmation of the patent originally issued.

DEPARTMENT OF JUSTICE,
August 7, 1878.

SIR: By a letter dated January 12, 1877, your predecessor in office submitted the following case and questions for the opinion of the Attorney-General:

"During the year 1871, Joseph Barsaloux invented a new and useful device called a metallic stiffener for boot and shoe heels.

"In the early part of 1872, and before application was made for a patent of said device, Barsaloux sold an undivided two-thirds thereof to Jeremiah S. James and Nelson Lyon.

"On the 11th of May, 1872, Barsaloux, James, and Lyon filed a joint application as inventors for letters patent for an improvement in metallic stiffeners for boot and shoe heels.

"On the 25th of June, 1872, Barsaloux, for a valuable consideration, sold, and, by an instrument in writing, assigned to James and Lyon his entire interest in his said invention, and requested patent to issue to them. This assignment was filed in the Patent Office June 28, 1872.

"On the 9th day of July, 1872, patent No. 128843 was granted to applicants for said device in accordance with their application.

"This patent is considered invalid for the reason that James and Lyon are described in it as inventors and not as assignees.

"Messrs. James and Lyon now ask that the patent may be corrected so as to show that Joseph Barsaloux was the inventor of said device, and that they are the assignees thereof.

"I am satisfied from the papers filed in the case that James and Lyon were described as inventors in the original application by the misadvice of their attorney and their own ignorance of the law.

"November 23, 1875, they filed an amended drawing, specification, claims, petition, and oath, and surrendered the

Correction of Patent.

old patent and asked a reissue of patent to Barsaloux as inventor and James and Lyon as assignees. This was rejected by the Commissioner of Patents on account of the prior joint patent.

"Subsequently, under the direction of the Commissioner of Patents, Barsaloux applied for a patent to issue to himself as inventor. This was rejected by the Commissioner for the reason that the invention had been in public use for more than two years prior to filing the application.

"The petitioners are now believed to be remediless unless the correction prayed for may be made.

"I have the honor, therefore, to request your opinion upon the following questions, viz :

"First. Have I the authority to permit and approve the correction prayed for?

"Second. If made, will the patent as corrected be valid?"

To the first of these inquiries I return a negative answer. The patent having been issued to Barsaloux, James, and Lyon jointly, in conformity to their application as joint inventors, it seems to me that in thus issuing the patent no clerical error or mistake can be attributed to the Department, notwithstanding it has since turned out that, in point of fact, the subject-matter of the patent was not the joint invention of all of the applicants, but the sole invention of one of them.

I entertain no doubt of the authority of the Department to correct its own clerical errors made in issuing a patent, as where, on a reissue, it has been granted to the original patentee when it should have been granted to his assignee, or where the date is incorrectly given, or the term of the patent wrongly stated, &c. But the case under consideration does not present an error of that sort. The error here presented consists of a false suggestion in the original application that the invention was joint. This, whether done through ignorance or by mistake, does not, in my opinion, afford any ground for the action prayed for. The patent issued upon that application must be deemed to be void, as a joint patent cannot be sustained upon a sole invention of one of the patentees (see 1 Mason's C. C. Rep., 473), and the Department cannot, by means of alterations or corrections, confirm or impart validity to a patent which was originally void.

Public Buildings at Omaha.

After a joint patent has once issued upon an application of two or more persons as joint inventors, if the application erroneously described the invention as joint instead of sole, it is not, as I have just intimated, within the power of the Department to remedy the matter by changing the terms of the patent already issued. The parties interested may file a new application, which, if seasonably done, can be made the basis for the issue of a new patent, but such new patent will not retroact by way of confirmation of the original.

The answer to the second inquiry is involved in my reply to the first.

I return herewith the patent which accompanied the letter of your predecessor.

I have the honor to be, very respectfully,

CHAS. DEVENS.

Hon. CARL SCHURZ,
Secretary of the Interior.

PUBLIC BUILDINGS AT OMAHA.

Under the provision in the act of June 18, 1878, chap. 263, authorizing the Secretary of War, "in his discretion, to expend the sum of \$60,000, or so much thereof as may be necessary, in the construction of suitable buildings for store-houses and offices at Omaha, Nebraska," he would not be warranted in accepting a gift of land on which to erect such buildings; it appearing that the Government already owns land at Omaha which is available for the purpose, and it being fairly inferable that Congress intended to provide for the construction of the buildings thereon.

DEPARTMENT OF JUSTICE,

August 9, 1878.

SIR: Your letter of the 7th instant requests my opinion as to whether, in expending the sum of \$60,000 appropriated by the act of Congress making appropriations for the support of the Army, &c., approved June 18, 1878, for the construction of suitable buildings for store-houses and offices at Omaha, Neb., you would be legally warranted in accepting any private gift of land offered to the United States for the purpose, or whether you might lawfully accept such land upon the condition that Congress shall ratify such acceptance, and in

Public Buildings at Omaha.

anticipation of such ratification proceed to build upon such land.

The language of the clause in question, after providing for an appropriation of \$880,000, is as follows: "Of which the Secretary of War be, and he hereby is, authorized in his discretion to expend the sum of sixty thousand dollars, or so much thereof as may be necessary, in the construction of suitable buildings for store-houses and offices at Omaha, Nebraska."

If it were necessary in order to make this expenditure that land should be purchased or otherwise obtained, it might be inferred that authority was given for the purpose, upon the general principle of interpretation that whenever a power is given by a statute to an officer of the Government everything necessary to making it effectual, or necessary to attain the end, is implied. Thus, it was held by me in an opinion which I had the honor to deliver to you on March 27, 1877, that an act approved March 3, 1875, making appropriations for a movable dam on the Ohio River, conveyed by implication the right to purchase the land necessary for its erection.

It appears from the papers inclosed with your letter that the Government is in possession of land at Omaha which is used for barracks for its troops, and that while the quantity of land at the barracks is limited, it is possible to construct the store-houses and offices in question on the public lands of the United States in the vicinity of the barracks.

Under these circumstances, it may fairly be argued that the intention of Congress in making the appropriation in question was to provide for the construction of suitable buildings of the character in question upon its own lands at Omaha. It does not seem to me that other and distinct sites might be selected by the Secretary from lands not owned by the United States, even if these lands could be obtained by gift. It must be inferred from the act in question, in connection with the fact that lands were owned by the United States at Omaha devoted to similar purposes, that it was the intention of Congress that the building should be erected upon those lands.

I am therefore of opinion that you would not be justified in accepting a gift of lands to be devoted by you to this pur-

Camp Wright, California.

pose, and further that you could not lawfully accept it upon the condition that Congress should ratify such acceptance, and in anticipation of such ratification proceed to expend the sum intrusted to you by erecting the buildings upon the land.

In this connection, I ought properly to add that if as an administrative officer you deem that the location of the lands now owned by the United States at Omaha is so ill adapted for the purpose designed by Congress as to justify you in withholding the expenditure of the appropriation until the facts can be reported to Congress and in some form authority obtained to accept a gift of land to the United States to be devoted to the purpose, you could with propriety take that course.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. GEORGE W. MCCREARY,
Secretary of War.

CAMP WRIGHT, CALIFORNIA.

On April 27, 1869, the lands within the limits of Camp Wright, in California, were set apart as a military reservation by order of the President. That order was revoked by a subsequent order of the President, dated July 26, 1876, which reserved said lands for the use and occupancy of the Indians of the Round Valley Indian Reservation. The limits of the latter reservation were defined by and under the act of March 3, 1873, chap. 333, and the lands of Camp Wright lie outside of those limits. Held that the limits of the Indian reservation cannot be enlarged by the President by annexing said lands thereto; but that the President may permit said lands to be used in connection with such reservation, so long as no action is taken by Congress for their disposal.

DEPARTMENT OF JUSTICE,

August 10, 1878.

SIR: Your letter of January 8, 1878, proposes certain inquiries as to the status of certain lands in California embraced within the limits of what was known as Camp Wright, one of which is whether these lands, which were reserved by the President for military purposes, may now be turned over to the Interior Department as a part of the

Camp Wright, California.

Indian reservation in Round Valley, such lands being no longer desired for military purposes. Other general inquiries are suggested which it will not be necessary in the present case to consider.

The facts as I ascertain them from the papers (although there is no formal statement of them in your letter) are substantially as follows :

On July 21, 1856, Round Valley, in California (within which Camp Wright is understood to be located), was selected by the Superintendent of Indian Affairs as an Indian reservation or rendezvous for the wild Indians of the mountains in that region.

On November 18, 1858, that officer was instructed by the Secretary of the Interior to give notice that the entire valley was set apart and reserved for Indian purposes. Subsequently, a survey of this reservation was made, its boundaries fixed, and plats of the survey furnished to the Indian Office at Washington, in June, 1860, showing the location of the reservation to be in townships 22 and 23 north, range 12 and 13 west, and to contain 25,030 acres.

It does not appear by the papers whether the lands comprised in Camp Wright were or were not within the boundaries of the Indian reservation thus fixed.

On April 14, 1868, instructions were issued by the Interior Department for the enlargement of that reservation. A new survey was thereupon made, of which a report was submitted to and approved by the Secretary of the Interior in March, 1870, and an order indorsed thereon, by the President, dated March 30, 1870, setting apart as an Indian reservation the lands embraced by this new survey. The area of the reservation was thereby enlarged so that it contained 31,683 acres.

The papers do not show whether or not the Camp Wright lands were within the limits of the new survey.

Under the act of Congress of March 3, 1873, the reservation was greatly reduced in area, and its boundaries again established—the south, east, and west boundaries by the act itself, and the north boundary by commissioners under authority of the act.

Camp Wright, California.

As I understand from what hereafter appears, Camp Wright was not within the boundaries of the Indian reservation as thus established by act of Congress. Camp Wright had been established as a military post by the military authorities in December, 1858, had been abandoned in September, 1861, and had been re-established by the same authorities in December, 1862. On April 27, 1869, it was formally set apart as a military reservation by order of the President.

On July 26, 1876, the President issued an order revoking the order of April 27, 1869, and reserving the lands covered thereby as belonging to Camp Wright for the use and occupancy of the Indians of the Round Valley Indian Reservation as an extension of such reservation.

There are two kinds of reservations for military purposes which will be found to have been made: one informal in its character and resulting originally only from the occupancy of the lands for military purposes; the other by a definite order setting apart such lands for military purposes by the President.

In regard to reservations of the first class, while a mere discontinuance of their use as a military post would not restore them to the condition of public lands if such discontinuance was temporary in its character, yet, as the foundation of such reservation was their use and occupancy, if once formally abandoned by the military authorities they could be restored to the ordinary condition of public lands.

In regard to reservations of a different class (to which Camp Wright belongs), if lands have been once set apart by the President in an order for military purposes, they cannot again be restored to the condition of public lands, or sold as such, except by an authority of Congress.

It follows of course from this that the lands known as Camp Wright were not in such situation that they could be held or disposed of as public lands.

The inquiry is then made whether they can now be annexed to the Round Valley Indian Reservation as a part of the same.

It appears by the statement of facts that the limits of this reservation have been defined by Congress, and that the lands in question are outside of those limits. Inasmuch as

Camp Wright, California.

Congress has by act defined the limits of this reservation, the President would have no right to enlarge the same by annexing lands thereto as a part of the same.

The general question of whether lands once reserved for military purposes may be transferred to Indian purposes as an Indian reservation does not arise in the present case. While the lands cannot be annexed to the Indian reservation as a part thereof, as they still continue to be reserved lands and are undisposed of by act of Congress, the President may permit the use of them in connection with such reservation, if it shall be found desirable so to do. Although reserved for one public purpose, if that public purpose has now ceased to exist and the lands are still held in reservation, if found convenient to be used in connection with another public purpose (as, in the present case, in connection with an Indian reservation), this may be permitted by the President, or the Secretary of the Interior acting by his authority.

It is well known that in many cases the Indian agency at a particular reservation is not located upon the reservation itself, but in convenient vicinity. If, therefore, it shall be found that these lands can be conveniently used in connection with the reservation, I can perceive no objection to their being thus used so long as no action is taken by Congress in regard to the disposal of them.

The remaining questions suggested in your letter I do not deem it advisable to undertake to answer in the general form in which they are put. It is sufficient to decide the case before us, and it would be difficult to lay down complete rules in regard to these reservations. They are made under such a variety of circumstances, for such various purposes, and under such different laws that each case is more conveniently considered and discussed as it arises in connection with the facts relating to it.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. CARL SCHURZ,
Secretary of the Interior.

Bonds dated on Sunday.—Bridge at Fort Snelling.

BONDS DATED ON SUNDAY.

Bonds of the United States bearing date July 1, 1877, which was Sunday, are valid.

DEPARTMENT OF JUSTICE,
August 21, 1878.

SIR: Yours of the 20th instant states that some of the bonds of the United States bear the date of July 1, 1877, which by reference appears to have been Sunday, and that upon that account some persons have expressed doubt as to their validity. Thereupon you ask whether there is upon that account any legal doubt as to the validity of those bonds.

The circumstance of the date above mentioned raises no legal doubt as to the validity of the bonds which bear it.

The observance of Sunday is a matter merely of statutory requirement, and there is no statute which covers the case mentioned.

You state that the date is formal, and does not designate the day of actual negotiation. I mention this as part of the facts in the case, but even if the bonds had been negotiated upon Sunday the law would have been the same.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Acting Attorney-General.

Hon. JOHN SHERMAN,
Secretary of the Treasury.

BRIDGE AT FORT SNELLING.

The act of June 20, 1878, chap. 359, appropriating \$35,000 to aid in the construction of a bridge at Fort Snelling, Minnesota, contemplates a supervision of the work as it progresses by the Government, to determine whether it is done in accordance with the plan and specifications approved by the Secretary of War.

The incidental expenses of the officer or officers detailed for that purpose (there being no special provision made therefor) are to be defrayed in the manner that similar expenses in analogous cases are met.

DEPARTMENT OF JUSTICE,
August 31, 1878.

SIR: I have the honor to acknowledge the receipt of your letter of the 27th, transmitting a communication from the

Bridge at Fort Snelling.

officer having supervisory charge of the construction of the Fort Snelling Bridge, and asking my opinion on the following points:

"1. Does the act require or imply a supervision on the part of the Government during the construction in order to determine whether the bridge has been built in accordance with the plan and specifications approved by the Secretary of War?

"2. If such supervision is required, how shall the expenses attending the same, such as pay of inspector and his incidental expenses, be defrayed, as no part of the appropriation, which is to be paid over entire to the bridge company, seems applicable to the same?"

It is clear from the act of June 20, 1878, that construction and completion of the Fort Snelling Bridge in conformity with the location, plans, and specifications approved by the Secretary of War, are conditions precedent to payment by the Secretary of the Treasury of the \$65,000 appropriated, and I am satisfied that it would be impossible by inspection after completion to determine whether the plans and specifications had been strictly adhered to. Even if such inspection could be thorough, condemnation at that time of the plan of construction, or portions of the material, might involve a reconstruction of the greater part, if not the whole, of the work, and delay the ultimate completion of the bridge.

The language of the act indicates that the appropriation is in the nature of a subscription or contribution to aid in the construction by the commissioners of Ramsey County of a bridge, and the letter of Charles J. Allen states that the bridge commissioners have already contracted for the work. Inasmuch as the act directs payment of the whole sum either to the commissioners or the persons entitled to receive the same by reason of the construction of said bridge, it is apparent that no portion of the appropriation is available for the payment of an inspector, and the proviso that the bridge shall be constructed without the expenditure of any other or greater sum of money from the Treasury of the United States implies that no office shall be created for the purposes of this work, the incumbent of which would be paid from some other appropriation.

Nautical Almanac.

In conclusion, I am of opinion that the Government, through an officer or officers detailed for that purpose, should have such constant supervision of the construction of the Fort Snelling Bridge as is compatible with other interests of the service; that there is no appropriation, so far as I am informed, available for the employment of an inspector to perform this supervision, and that the incidental expenses of the officer or officers so detailed should be defrayed in the manner that similar expenses in analogous cases are met.

The inclosures of your letter are herewith returned.

Very respectfully, your obedient servant,

CHAS. DEVENS.

HON. GEORGE W. McCRARY,
Secretary of War.

NAUTICAL ALMANAC.

The printing and binding, at the Government Printing Office, of the book called "The American Ephemeris and Nautical Almanac," for the Navy Department, are within the appropriation made by the act of June 20, 1878, chap. 359, for printing and binding for that Department, and accordingly are authorized by law.

DEPARTMENT OF JUSTICE,

September 10, 1878.

SIR: Herewith I submit a reply to yours of the 6th instant, addressed to the Attorney-General, asking whether "The American Ephemeris and Nautical Almanac" can be printed and bound at the Government Printing Office under the provision of law now existing, especially in view of that contained in the appropriation act of June 20 last, to the effect that "no books shall be printed and bound except when the same shall be ordered by Congress or are authorized by law."

Upon consideration, it seems to me that the printing and binding of the Nautical Almanac is authorized by law.

In the first place, a nautical almanac is well known to be a *book*. It is a "nautical book" of the sort mentioned in section 432 of the Revised Statutes.

The machinery by which the Secretary is authorized from year to year to have this book made is to be found in section

Improvement of South Pass of the Mississippi.

3661 of the Revised Statutes, in connection with the annual reports by, and appropriations for, that officer. By the former provision the Secretary is to submit to Congress an estimate "for printing and binding to be executed under the direction of the Congressional Printer." In response to such estimate for the present year, Congress, by the act of June 20, above mentioned, appropriated *for printing and binding for the Navy Department* \$53,000. That the nautical book called "The American Ephemeris and Nautical Almanac" is entitled to the benefit of that appropriation appears by the *act making appropriations for the naval service, &c.*, of May 4, 1878, where one of the items is "For expenses of Nautical Almanac"; no sum being mentioned in that connection, but the provision being left to be explained by the appropriation which follows, *for preparing that work for publication*, and by that in the act of June 20, 1878, above cited, covering *printing and binding for the Navy Department*.

I submit my opinion, therefore, that there is an express authorization by law for not only the *preparation*, but also the *printing and binding*, of the Nautical Almanac during the present year at the office of the Congressional Printer.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Acting Attorney-General.

Hon. R. W. THOMPSON,
Secretary of the Navy.

IMPROVEMENT OF SOUTH PASS OF THE MISSISSIPPI.

It was intended by section 2 of the act of June 19, 1878, chap. 313, to make provision for remunerating Captain Eads for what had then been done by him in the work of improving the South Pass of the Mississippi River; and by section 3 of the same act it was intended to provide for advances to be made to him as the work progressed thereafter. The words "construction" and "prosecution," as used in section 3, have the same meaning. It is sufficient, under that section, to entitle Mr. Eads to payment, if it appears that the materials are actually furnished in such manner that the United States can at once have the benefit of them in the structure, or that the labor is actually done, or the expenditures actually incurred, in the prosecution of the work, of which the Government can immediately have the benefit.

Improvement of South Pass of the Mississippi.

The phrase in section 3, viz, "to pay for materials furnished, labor done and expenditures incurred," &c., does not include materials, &c., other than such as are furnished, &c., after June 19, 1878.

Materials are "furnished" when they are upon the ground and immediately available for use in the structure.

The words "expenditures incurred" do not mean liabilities incurred; they signify payments or expenditures of money actually made. An expenditure made subsequently to June 19, 1878, in discharge of a liability incurred previously to that date, would not be within section 3. The word "properly," as employed in the first *proviso* in that section, means actually done in the prosecution of the work by Captain Eads according to his plans; it does not modify the provision in the act of March 3, 1875, chap. 134, that he "shall be untrammelled in the design and construction of said jetties," &c.

DEPARTMENT OF JUSTICE,

September 17, 1878.

SIR: Your letter of the 30th ultimo proposes certain questions which were asked of the Second Comptroller and answered by his communication to you of the 9th ultimo, in which he suggests that it might be proper to take the advice of the Attorney-General in regard to them. These questions were originally proposed by Major Comstock in a letter to you of August 1, 1878, and involve the construction of the third section of the act of June 19, 1878, relating to the undertaking of Captain Eads to widen and deepen the channel of the South Pass of the Mississippi River.

The original act of 1875, under which this great improvement was entered upon, provided that the payments to Captain Eads, who undertook the work, should depend entirely as to time and amount upon the success of his labor; that is, it was provided that when he had attained a certain depth and width of channel he should be paid a certain sum, when a certain additional width and depth had been attained he should be paid a certain additional sum, and so on.

The act of 1878 directs that certain of the payments provided for in the act of 1875 shall be accelerated or advanced upon certain specified conditions. Section 2 authorizes the immediate payment of \$500,000—one of the installments not yet due or payable under the original act—on condition that Captain Eads shall relinquish all claim to the payment of said future installment. Section 3 provides that an addi-

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tional sum of \$500,000—not yet due or payable under the provisions of the act providing for this improvement—may be paid to Captain Eads on similar relinquishment, but only in monthly installments as he may require the money “to pay for materials furnished, labor done, and expenditures incurred, from and after the passage of this act, in the construction of said works.”

When these two sections are taken together, it is, I think, seen that Congress, by the second section, intended to make sufficient provision for remunerating Captain Eads for all that had been done by him in the prosecution of his enterprise up to that time, and that by the third section it intended to provide for advances to be made to him as the work progressed from and after June 19, 1878.

The most important question presented is whether materials furnished, labor done, and expenditures incurred in this work can be paid for under the third section, if such materials are not actually used, such labor actually performed, or such expenditures actually made, in the construction of the works themselves.

It is contended by Captain Eads that if materials are furnished, &c., to be used in the construction of the works, and he has actually furnished them for the purpose, so that they are within the control of the United States authorities, he is entitled to receive payment upon them although they have not yet been actually employed in the structures themselves which he is engaged in erecting.

An examination of the section shows that he is to be paid a sum not to exceed \$500,000 in monthly installments as he “may require in the prosecution of the works authorized by said hereinbefore recited act, to pay for materials furnished, labor done, and expenditures incurred, from and after the passage of this act, in the construction of said works: *Provided*, The said Eads, or his legal representatives, shall file in the office of the Secretary of War, with each requisition made by him or them, a certified statement, which shall be made by the engineer officer provided for in said act, that the requisition is for the amount of work properly done, materials furnished, and expenditures incurred in the prosecution of the work.”

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It will be observed that in these clauses the word "prosecution" in connection with the works is used twice, and the word "construction" once. And the inquiry arises whether any different meaning is to be given to the word "construction," so that in order to receive the installments it shall be necessary to show that the materials furnished, &c., have actually entered into the structure.

In my view of the case, when it is considered that the gross sum of \$500,000 is to be paid to Captain Eads as he may require it in the prosecution of the works, and as it is to be paid upon certified statements of the engineer in charge that each requisition is for materials furnished, &c., in the prosecution of the works, no different meaning should be given to the word "construction" where it is used than to the word "prosecution." And if it appears that materials are actually furnished in such manner that the United States can at once have the benefit of them in the structure, and that labor is actually done and expenditures actually incurred in the prosecution of the works, of which the United States can immediately have the benefit, Mr. Eads would be entitled to payment therefor. It is not intended by this that materials furnished by Mr. Eads, or labor done or expenditures incurred by him, are to be paid for by the United States, unless the Government is placed in such a position that it can have the benefit of them. This interpretation seems to me to be in accordance with what is evidently the liberal intention of the act to enable Mr. Eads to proceed with the work, and to give greater assistance to him than was originally intended by Congress when the work was entered upon, in consequence largely of the enormous expense involved. It may be presumed, also, in consequence of what is believed by Congress to be the probable success of the work.

With this preliminary statement, I proceed to answer directly your inquiries :

1. The phrase "to pay for materials furnished, labor done, and expenditures incurred, from and after the passage of this act, in the construction of said works," does not include materials, &c., other than those furnished subsequently to June 19, 1878. At the same time it may be proper to add that if

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materials had arrived at South Pass previously to that date and their delivery was not accepted until subsequently thereto, such materials could properly be paid for under the section in question.

2. Such material need not actually be put into the works before payment can be made, if it is so furnished that it is immediately available for the purpose of being used in the structure, and is upon the ground for that purpose.

8. The words "expenditures incurred" do not, in my opinion, mean liabilities incurred. The governing word is "expenditures." To incur an expenditure is to make a payment, to expend the money. To incur a liability and to incur an expenditure are two different and distinct things; and while the word "incur" is not frequently used in connection with "expenditure," yet when thus used it means an expenditure actually made. Such expenditures must actually be made since June 19, 1878, and Captain Eads can not receive compensation for those made previously to that time. The latter expenditures were intended to be covered by the appropriation under the second section of the act. As in my view of the act these expenditures are included in the provision made by the second section, I should perhaps add that an expenditure made subsequently to June 19, 1878, in the discharge of a liability previously incurred, would not properly be payable under the third section.

4. The meaning of the word "properly" in the phrase "a certified statement, which shall be made by the engineer officer provided for in said act, that the requisition is for the amount of work *properly* done," &c., is not intended to modify the specification in the act of 1875, providing "that Mr. Eads shall be entirely untrammelled * * * in the design and construction of said jetties." As here used, the word "properly" means actually done in the prosecution of the work by Captain Eads according to his plan.

5. Without discussing the question whether these payments for material render it the property of the United States, it is sufficient to say that by such section no further duty is imposed upon the officer in charge in relation to it unless it should be interfered with by some person other than Captain Eads or

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his representatives. It is to be used by him in the prosecution of his plans.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. GEORGE W. McCRAEY,
Secretary of War.

IMPROVEMENT OF SOUTH PASS OF THE MISSISSIPPI.

Section 3 of the act of June 19, 1878, chap. 313, contemplates that the "materials furnished," payment for which is thereby authorized, shall be free from any lien, claim, or charge thereon after the payment is made. Accordingly when payment is about to be made for such materials thereunder, the officer in charge should be satisfied that they are free from any lien, claim, or charge in favor of third parties, or, if any such lien, claim, or charge exists, that the payment is immediately applied to satisfy the same.

DEPARTMENT OF JUSTICE,

September 21, 1878.

SIR: Your letter of the 20th instant proposes a certain question in addition to those proposed heretofore by you and answered in my letter of the 17th instant in relation to the interpretation to be given to the act of June 19, 1878. This inquiry is, whether certain materials which are now at the South Pass, and delivered since June 19, 1878, to be used in the construction of jetties and the prosecution of the work, can properly be paid for to Captain Eads without some proof that he has paid for them.

On referring to my letter of September 17 last, it will be seen that such payment might be made "if it appears that materials are actually furnished in such manner that the United States can at once have the benefit of them in the structure, and that labor is actually done and expenditures actually incurred in the prosecution of the work, of which the United States can immediately have the benefit."

This statement necessarily contemplates that the material shall be furnished in such manner that it will be free from any lien, claim, or charge upon it of any party other than Captain Eads, or that when payment is made it shall be seen that such payment is so applied that the material in ques-

PENSIONS FOR SERVICE IN WAR OF 1812.

tion will be released from any charge or claim upon it. Were this not the case, it would be obvious that the United States might hereafter be subjected to claims on account of such material from third persons, legal in their character if there existed a legal lien or charge upon the material in favor of a third party, or equitable if there were no such legal charge, by an appeal to the general equity of the United States if material had been used by it upon which third parties had an equitable claim.

In direct answer to your inquiry, I therefore reply that when payment is made for such material the engineer officer should be satisfied that it is free from any lien or other charge in favor of third parties, or should see that the payment is immediately applied to liquidating such lien or charge.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. GEORGE W. McCARY,

Secretary of War.

PENSIONS FOR SERVICE IN WAR OF 1812.

The provision in the first section of the act of March 9, 1878, chap. 28, authorizing and directing the Secretary of the Interior "to place on the pension-rolls the names of the surviving officers and enlisted and drafted men * * * of the military and naval service of the United States, who served for fourteen days in the war with Great Britain," does not include service performed in the land or naval forces after the ratification of the treaty of peace between the United States and Great Britain, which took place February 17, 1815.

That act is to be construed in connection with the act of February 14, 1871, chap. 50, wherein the "war with Great Britain" referred to above is expressly declared to have been terminated by the treaty of peace.

Held, accordingly, that a soldier who served fourteen days after the date of the ratification of the treaty of peace is not entitled to the benefit of the act of March 9, 1878.

DEPARTMENT OF JUSTICE,

September 21, 1878.

SIR: I have received your letter of the 23d ultimo, accompanied by a communication from Hon. Robert B. Vance and Hon. A. S. Merrimon, of North Carolina, in reference to the decision of the Department of the Interior in the claim of

Pensions for Service in War of 1812.

Mrs. Mary Sams for pension under the act of March 9, 1878, on account of the service of her husband, James Sams, in the war of 1812.

You request my opinion upon the point upon which the rejection of the claim is based.

It appears that the husband of the applicant, James Sams, served in Captain Lowry's company of North Carolina militia from February 17, 1815, to March 12, 1815; and the question is whether he can be treated as having served fourteen days in the war of 1812 with Great Britain.

As the act of March 9, 1878, directs the Secretary of the Interior "to place on the pension-rolls the names of the surviving officers and enlisted and drafted men * * * of the military and naval service of the United States, who served for fourteen days in the war with Great Britain of 1812, or who were in any engagement and were honorably discharged, and the surviving widows of such officers and enlisted and drafted men," the inquiry therefore presents the question: What construction is to be given to the phrase "in the war with Great Britain"?

The ratification of the treaty of peace between the two countries took place upon the 17th of February, 1815, the day upon which Sams enlisted. Considering the difficulty of communication in the portion of the country where his service was rendered, it may fairly be inferred that his enlistment, and perhaps his term of service for at least fourteen days, took place in ignorance of such ratification.

The statute of March 9, 1878, is to be considered in connection with the act of February 14, 1871, of which it is an extension. The latter act provided for a service of sixty days by the beneficiary who is to receive advantage from its provisions, and an examination of it tends to show that the construction to be given to the phrase "in the war with Great Britain" is that the service must have been rendered previously to the ratification of the treaty of peace. In the proviso to the first section, which limits the rights of widows to those who shall have been married prior to the treaty of peace, the phrase is "prior to the treaty of peace which terminated said war."

If this is the correct construction of the act of February 14,

Use of Patented Articles.

1871, there can be, I think, no reasonable doubt that the act of March 9, 1878, must be construed in the same way, as it is simply an extension of the benefits of the former statute to soldiers who had served for a less term, or who had actually participated in an engagement.

In an opinion rendered by my distinguished predecessor, Attorney-General Wirt, upon the statute of March 18, 1818, which was intended to provide for the benefit of officers and soldiers who had been engaged in the land or naval service of the United States in the revolutionary war, it was held by him that the phrase "who served in the war of the Revolution until the end thereof" must be considered as a service up to the time of the ratification of the treaty of peace, and that the war existed until that time. (1 Opin., 701.).

The question here presents itself in a somewhat different form, because the inquiry is whether the war can be held to have existed after the treaty of peace; but upon the principle of that decision, which is that the treaty of peace regularly ratified marks by distinct act the conclusion of the war, I am compelled to hold that a soldier who served for fourteen days after such ratification is not entitled to the benefit of the act. Notwithstanding it may be conceived that meritorious service might have been rendered after the ratification of the treaty of peace and in ignorance thereof, still for such service Congress has not provided, unless it be by the clause in reference to those who were actually in an engagement, which is not the case with Mr. Sams. Should such cases be presented, it is for Congress, and not for us, to consider whether the benefits of the act should be extended to them.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. CARL SCHURZ,

Secretary of the Interior.

USE OF PATENTED ARTICLES.

Officers of the United States, when they use articles manufactured in violation of the rights of patentees, are liable to suit therefor. Hence where articles are advertised for by the United States, and it is claimed

Use of Patented Article .

by an unsuccessful bidder or other party that the successful bidder, in order to furnish the articles, must make them in violation of his patent, it is proper that the successful bidder should be required to furnish a satisfactory bond of indemnity for the security of the officer against any suit for infringement of patent by the use of the articles.

DEPARTMENT OF JUSTICE,

September 24, 1878.

SIR: The letter of General Myer, Chief Signal Officer of the Army, of date February 26, 1876, inclosed in the communication of Acting Secretary Robeson, of March 4, 1876, to the Attorney-General, presents a series of inquiries as to the practical administration of the duties of his office in connection with the subject of articles which have been patented, or are claimed to be infringements of patents, rather than questions of law.

I will, however, briefly state what I understand to be well-settled legal principles, and, in connection therewith, make such suggestions as the letter in question seems to me to call for.

A patent is a certificate of the proper officer, the Commissioner of Patents, that the article or process patented is in his opinion useful and novel. Its validity may be contested in the proper courts by those who contend that the article or process is otherwise than useful or novel. In the case of patents which actually conflict, that patent has priority of right which has priority of date.

Officers of the United States (like private citizens), when they use articles which are made in violation of the rights of patentees, are liable to suit, and this whether the article be one actually described in a patent which has been issued, but which is invalid because a prior patent was lawfully issued for the same thing, or whether it be one which is made by a pure infringement of a lawfully granted patent.

The United States not being the subject of suit, those of its officers who use in the performance of their duties articles made in infringement of the lawful rights of patentees are subject to suit. But it has been the custom heretofore of the United States to defend such officers when they have acted in the careful performance of their duty, in the use of articles which they deemed to be necessary for the proper adminis-

Subsidiary Silver Coins—Legal Tender.

tration of their respective offices. It would in such case be the duty of the United States to provide not only counsel for its officers, but also to indemnify them against any judgments which might be recovered against them, if they have acted in their respective spheres of duty carefully and judiciously.

When, therefore, articles are advertised for by the United States, and it is claimed by the unsuccessful bidder that the successful bidder, to furnish such articles, must make them in violation of his lawful rights as patentee, it is proper that the successful bidder should be required to furnish sufficient security to the officers of the United States that he will protect them against any suits for the use of articles which infringe other patents. No particular form need be required for such security, but the ordinary form of a bond of indemnity will be sufficient.

The questions of General Myer relate more particularly to certain insulators which are used in the operations of his office, and which have been contracted to be furnished by one who claims to have the right to manufacture them, another claiming that such articles are made in infringement of his previous patent.

With the suggestions I have already made, it will be for General Myer to determine whether there is such reason to believe that the article furnished him is in violation of the patent that the party furnishing it should indemnify him against suit, or, even if he should be of opinion that it is in violation of the patent of another, whether the use of it is so valuable to his operations that he would be justified in incurring the claim for damages which might be made against him by the lawful patentee.

Very respectfully, your obedient servant,

CHAS. DEVENS.

HON. GEORGE W. McCRARY,
Secretary of War.

SUBSIDIARY SILVER COINS—LEGAL TENDER.

Section 3586 Rev. Stat. makes the subsidiary silver coins of the United States legal tender at their nominal value only where the *amount of the debt*, in payment of which they are offered, does not exceed five dollars.

Subsidiary Silver Coins—Legal Tender.

The provision applies alike to cases wherein the officers of the Government are receiving payment of its dues and to cases wherein they are disbursing the public funds in discharge of its obligations.

DEPARTMENT OF JUSTICE,

September 24, 1878.

SIR: Your letter of the 20th instant inquires "whether, under the provisions of section 3586 of the Revised Statutes of the United States, public officers are compelled to receive the subsidiary silver coins of the United States to the amount of five dollars in each payment of public dues, when the amount to be paid is more than five dollars; and whether any other person than a public officer can legally be required to receive these coins to the amount of five dollars in satisfaction of a debt when the payment to be made is more than five dollars."

I think it quite clear that the rule is to be the same whether the United States is to pay or to receive the sum in regard to which you inquire, and that the same law therefore applies to its officers when they are receiving the dues of the Government and when they are disbursing its funds.

The language of the section referred to is literally copied from the last clause of the 15th section of the act of February 12, 1873 (17 Stat., 427).

Some light upon your inquiry may be gained by an examination of the statute of February 21, 1853, which preceded the one last referred to. The second section of that statute is in these words: "That the silver coins issued in conformity with the above section" (which were the subsidiary coins) "shall be legal tenders in payment of debts for all sums not exceeding five dollars."

The construction of this section seems to be that the words "for all sums not exceeding five dollars" qualify the word "debts," and that the meaning of this statute is that the debts themselves shall be debts not exceeding in amount the sum of five dollars.

If any ambiguity exists in this section, I think it is removed when we examine the contemporaneous discussion of this subject, which shows what the actual intent of Congress was, whether the words to express it be happily chosen or not.

The Secretary of the Treasury, Thomas Corwin, in recom-

Subsidiary Silver Coins—Legal Tender.

mending legislation which was substantially adopted by Congress, remarks: "If this plan is adopted by Congress, it will of course involve the necessity of making silver coin a legal tender only for debts of small amount, say not exceeding ten dollars, which is about the same limit (forty shillings) which has been established in Great Britain." (Ex. Doc. 18, first session Thirty-second Congress, p. 13.)

In the report which accompanied the bill which was finally passed, and which was made by Mr. Hunter in the Senate, the following sentence is used: "To secure the use of a silver coin, in place of small notes, for the minor transactions of commerce, it is proposed to make this coin a legal tender for sums not exceeding five dollars." * * * (Senate Report 104, first session Thirty-second Congress, p. 10.)

Examining the debates upon the bill in the House, it will be seen that both the friends and opponents of it recognized that the coin was to be a tender for debts not exceeding five dollars. Thus, Mr. Dunham, the chairman of the Committee on Ways and Means, says: "The provision of the Senate for the accomplishment of this" (that is, to give currency and credit to the new coins) "is to make them a tender in payment of small debts of five dollars and under." (Appendix to Congressional Globe, Vol. 27, p. 190.)

Mr. Johnson, of Tennessee, who opposed the bill, says: "The Senate recommend that this coin shall be made a legal tender for any amount less than five dollars, and pass a bill containing such a provision." (Congressional Globe, Vol. 26, p. 491.)

Mr. Skelton, in opposing certain amendments, one of which was to strike out the clause making the silver coin a legal tender, thus describes it: "The first amendment is to the first section of the bill, which makes the coin about to be coined under this new act a legal tender for all debts under the denomination of five dollars." * * * (*Ib.*, vol. 26, p. 629.)

A careful examination of these debates has not shown me that the provision in question was construed by any member as authorizing the payment of five dollars in silver coin as part of a larger amount.

It was upon this section that Secretary McCulloch issued his circular of the date of October 29, 1868. No reference

Alaska.

was made by him to this section, but that was the law in force at the time the circular was issued. In my opinion, the section was rightly construed by it.

It was not intended, I think, to make any change in the law upon this point, as it existed, by the use of the somewhat different phraseology in the fifteenth section of the act of February 12, 1873. And while it must be acknowledged that the language upon this point is not as explicit and clear as could be desired, I am of opinion that the section of the Revised Statutes referred to in your letter is to be construed as permitting the payment of five dollars in subsidiary silver coin only when the debt for which it is thus made a legal tender does not exceed the sum of five dollars.

From this view it would follow that the Department circular of June 23, 1875, is correct.

The construction given by me of section 3586 is the one which has heretofore been adopted by the Treasury, and is, in my opinion, justified by the terms of the act.

Very respectfully, your obedient servant,

CHAS. DEVENS.

HON. JOHN SHERMAN,
Secretary of the Treasury.

ALASKA.

The President has no authority, by virtue of section 2132 Rev. Stat., to prohibit the introduction of molasses into the Territory of Alaska (the article being used there for manufacturing distilled spirits for sale among the natives) when in his judgment the public interest seems to require that he should do so. In this matter that Territory cannot be considered as a country belonging to an Indian tribe.

DEPARTMENT OF JUSTICE,

September 24, 1878.

SIR: Your letter of the 20th instant informs me that upon representations received by you from the collector of customs at Sitka, Alaska, it would appear to be for the interest of the white residents of the Territory and the Government to prohibit the introduction in that Territory of molasses, which is used for manufacturing distilled spirits for use among the

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natives, and inquires of me whether under section 2132 of the Revised Statutes, which authorizes the President, whenever in his opinion the public interest may require, to prohibit the introduction of goods, or any particular article, into the country belonging to any Indian tribe, he would be justified in forbidding the introduction of molasses into said Territory.

The Territory of Alaska was acquired by Congress by virtue of its treaty with Russia of March 30, 1867, by which the inhabitants of that Territory were, with the exception of the uncivilized native tribes, to be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and to be maintained and protected in the free enjoyment of their liberty, property, and religion. The uncivilized tribes were to be subject to such laws and regulations as the United States might from time to time adopt in reference to them.

An act was passed on July 27, 1868, "to extend the laws of the United States relating to customs, commerce, and navigation over the territory ceded to the United States by Russia, to establish a collection district therein, and for other purposes."

This law was amended on the 3d of March, 1873, by extending over this Territory two sections of the act of June 30, 1834, which was an act to regulate trade and intercourse with Indian tribes, and to preserve peace on the frontiers. These two sections are the twentieth and twenty-first, one of which (not necessary to be fully stated) forbids the selling or disposing of any spirituous liquor, &c., to any Indian (in the Indian country), and the other of which forbids any person within the limits of the Indian country from setting up or continuing any distillery for manufacturing ardent spirits.

In the opinion of my predecessor, Attorney-General Williams, of November 13, 1873, in answer to the inquiry whether the Territory of Alaska was embraced within the term "Indian country," he holds that as to these provisions Alaska is to be regarded as Indian country; but it will be observed that he limits his opinion to these two sections, and does not hold that in the general use of the term Alaska is to be treated as Indian country, and be subjected to all the laws which have been made in relation to such country.

Real Estate acquired in Satisfaction of Judgments.

The section (2132) of the Revised Statutes by which the President is authorized to forbid the introduction of goods, or any particular article, into a country belonging to an Indian tribe, is part of the third section of the act of June 30, 1834. Its provisions, therefore, are not in terms extended over the Territory of Alaska. When two sections of the same statute are expressly made applicable to a certain people by extension, it must be inferred that there was no intention on the part of Congress to extend more than those two sections.

Alaska cannot be considered merely as an Indian country. It is inhabited to a limited extent by white persons, whose rights, property, and religion, which were guaranteed by the treaty between the United States and Russia, should be protected by the United States, and the whole Territory cannot be subjected to the rules applied to Indian country, unless, at least, Congress should expressly render it subject to them.

In direct answer to your inquiry, I therefore reply that in the matter referred to the Territory of Alaska cannot be considered as a country belonging to an Indian tribe, and that authority is not given to the President by virtue of the section referred to to prohibit the introduction of goods, or of any particular article, into the same, when in his opinion the public interest seems to require that he should so do.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. JOHN SHERMAN,
Secretary of the Treasury.

REAL ESTATE ACQUIRED IN SATISFACTION OF JUDGMENTS.

The Commissioner of Internal Revenue is not authorized by law to take charge of lands acquired by the United States in satisfaction of judgments recovered on the official bonds of collectors of internal revenue, and, with the approval of the Secretary of the Treasury, to dispose of the same by sale or otherwise.

Sections 3624, 3625, and 3217 Rev. Stat. (the last-mentioned section applying solely to collectors of internal revenue) have for their object the enforcement of the liabilities of officers who are accountable for public money; and though extending to revenue officers, they cannot properly be regarded as revenue laws.

Real Estate acquired in Satisfaction of Judgments.

Hence real estate, acquired by virtue of proceedings thereunder against a collector of internal revenue, cannot be considered as acquired "in payment of debts arising under the laws relating to internal revenue" within the meaning of section 3208 Rev. Stat. The provision in that section, just adverted to, refers to real estate acquired in payment of fines, taxes, penalties, and forfeitures incurred under the internal-revenue laws.

The Solicitor of the Treasury, by virtue of sections 3749 and 3750 Rev. Stat., has charge of, and, with the approval of the Secretary of the Treasury, power to rent or sell lands acquired in satisfaction of judgments on bonds of internal-revenue collectors.

DEPARTMENT OF JUSTICE,
September 25, 1878.

SIR: Your letter of the 19th instant inquires, at the suggestion of the Acting Commissioner of Internal Revenue, whether, under the provisions of section 3208 of the Revised Statutes, the Commissioner of Internal Revenue is authorized to assume control of, and, with the approval of the Secretary of the Treasury, to sell and dispose of lands acquired by the United States in payment of judgments recovered on the official bonds of collectors of internal revenue.

In order to answer this question it will be necessary for me briefly to restate the legislation concerning property which may be received in various ways by the United States in the collection of its lawful dues from officers who are accountable to it, or under the various provisions of the revenue laws.

Section 3624 of the Revised Statutes (which is from the statute of March 3, 1797) provides that "Whenever any person accountable for public money neglects or refuses to pay into the Treasury the sum or balance reported to be due to the United States upon the adjustment of his account, the First Comptroller of the Treasury shall institute suit for the recovery of the same." * * *

Section 3625 is derived from later statutes—those of May 15, 1820, and May 29, 1820—and provides for other remedies against collectors of the revenue, receivers of public money, and other officers who fail to render their accounts, or pay over the money received by them as officers of the United States, by authorizing the Solicitor of the Treasury, upon the certificate of the First Comptroller of the amount due the United States from such officer to "issue a warrant of dis-

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tees against the delinquent officer and his sureties, directed to the marshal of the district in which such officer and his sureties reside." * * *

Section 3217 (derived from the statute of June 30, 1864) applies only to collectors of internal revenue, and is even more summary in its procedure than the section last referred to. It authorizes the Solicitor of the Treasury, upon the report merely of the First Comptroller, to issue a warrant of distress against the delinquent collector, expressing the amount with which the collector is chargeable, &c.

By section 3749 the Solicitor of the Treasury is authorized, with the approval of the Secretary of the Treasury, to rent or sell any unproductive lands, or other property of the United States acquired under judicial process or otherwise in the collection of debts, after certain advertisement thereof, "in such manner and upon such terms as may, in his judgment, be most advantageous to the public interest."

Section 3750 gives to the Solicitor of the Treasury "charge of all lands and other property which have been or may be assigned, set off, or conveyed to the United States in payment of debts, and of all trusts created for the use of the United States in payment of debts due them." It is provided, however, "That this section shall not apply to real estate which has been or shall be assigned, set off, or conveyed to the United States in payment of debts arising under the internal revenue laws, nor to trusts created for the use of the United States in payment of such debts due them."

The next provision is section 3208, which gives to the Commissioner of Internal Revenue charge of all real estate and trusts accruing to the United States under the internal-revenue laws, and power to dispose of the same by sale or otherwise, with the approval of the Secretary of the Treasury.

Upon an examination of these sections it will be seen that a complete system is made by them by which the Solicitor of the Treasury, with the approval of the Secretary of the Treasury, has control of and the right to sell all property of the United States received by assignment, set off, or conveyance in payment of debts due it, with the exception of that received in payment of debts arising under the internal-revenue laws, and that by section 3208 a similar authority is given to the

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Commissioner of Internal Revenue over all property so received for debts arising under the internal revenue laws.

The only question to be determined, therefore, is, whether real estate received in satisfaction of a judgment against a collector of internal revenue upon his official bond is property in charge of and to be sold by the Solicitor of the Treasury, or by the Commissioner of Internal Revenue, under the provisions of law relating to them in this connection.

It appears to me that the true construction of section 3624 is that when a collector of internal revenue is sued upon his bond he is sued as a person accountable for public money, and that it is his accountability to the United States as a recipient of public money that renders him liable to suit, although in point of fact the money was received by him as a collector.

That section, and also sections 3625 and 3217 (the latter applying solely to collectors of internal revenue), have for their object the enforcement of the liabilities of officers who are accountable for public money; but, though they extend to revenue officers, they cannot properly be regarded as revenue laws. Hence, where real estate is acquired by the United States by virtue of proceedings under their provisions against a collector of internal revenue, such real estate is not to be understood as acquired "in payment of debts arising under the laws relating to internal revenue" within the meaning of section 3208.

Examining sec. 3208 in connection with those sections, it will be seen that sufficient force is given to that section by holding that it refers to real estate derived under provisions relating to fines, taxes, penalties, and forfeitures incurred under the internal-revenue laws themselves.

In direct answer to your inquiry, I would therefore state that in my opinion the Commissioner of Internal Revenue is not authorized to assume control of, and, with the approval of the Secretary of the Treasury, to sell and dispose of lands acquired by the United States in payment of judgments recovered on official bonds of collectors of internal revenue, but that this power is given to the Solicitor of the Treasury, with the similar approval of the Secretary of the Treasury, for the reason that the judgments have been recovered in

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suits brought to enforce the accountability of officers entitled to receive money of the United States.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. JOHN SHERMAN,

Secretary of the Treasury.

EXPENSES OF SOLDIERS AS WITNESSES.

The necessary expenses incurred by soldiers as witnesses for the Government, allowable under section 850 Rev. Stat., may be paid by marshals upon proper proof thereof.

DEPARTMENT OF JUSTICE,

September 27, 1878.

SIR: Referring to your letter of the 10th ultimo, inquiring whether the reimbursements of actual expenses to soldiers who may appear as witnesses for the United States, as provided in section 850 of the Revised Statutes, should be paid by the marshal, I have the honor to reply that the section referred to does not provide by whom such expenses shall be audited and paid, and, perhaps, it may be ordinarily expected that they would be paid at the Treasury Department. It seems, however, that under his general authority in connection with the business of the courts the marshal may properly be authorized to pay such expenses upon proof thereof, and I shall be ready in all cases where soldiers are summoned as witnesses to authorize that officer so to do.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. GEORGE W. McCrary,

Secretary of War.

ENROLLED MISSOURI MILITIA—HOMESTEAD.

The troops known as the "enrolled Missouri militia," though acting from time to time in co-operation with the Army of the United States in the suppression of the rebellion, constituted no part of it, they never having been mustered into the service of the United States.

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An order disbanding such troops (though entirely creditable to the troops thus disbanded) is not an honorable discharge within the meaning of section 2304 Rev. Stat.

Persons who served with said enrolled militia are therefore not entitled to enter homesteads under the provisions of that section. To entitle them thereto further legislation is necessary.

DEPARTMENT OF JUSTICE,
September 28, 1878.

SIR: Referring to your letter of the 10th instant, in reference to the "enrolled Missouri militia," before proceeding to reply to your inquiries and those suggested by the letter of the Commissioner of the General Land Office, it will be proper to consider the history and position of these troops.

It appears that by arrangement between the United States and the governor of Missouri a military force was raised to serve within that State as State militia during the war, there to co-operate with the troops in the service of the United States in repelling the invasion of that State and suppressing the rebellion therein. Said militia were to be enrolled, to be held in camp and in the field, and drilled, disciplined, and governed according to the Army regulations, and be subject to the Articles of War. They were not to be ordered out of the State except for its immediate defense, but were to co-operate with the United States troops in military operations within the State or necessary to its defense.

It was further provided that the general officer in command of the department should be chief in command of the State forces, and under special orders issued by the governor of Missouri Brig. Gen. John M. Schofield proceeded to organize these troops by summoning all able-bodied men capable of bearing arms and subject to military duty to repair without delay to the nearest military post and report for enrollment to the commanding officer.

These troops were divided into companies, regiments, and brigades, and were thereafter subject to the call of the military authorities of the United States and the governor of the State. When so ordered into active service they were under the command and subject to the orders of the officers of the Federal Government in charge of the department.

From time to time these troops were called into active

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service, and rendered valuable and gallant aid in periods varying from seven days to as many months, some of them participating bravely in hard-fought engagements.

Section 2304 of the Revised Statutes (taken from the first section of the act of June 8, 1872, 17 Stat., 333) is as follows:

“Every private, officer, and soldier who has served in the Army of the United States during the recent rebellion for ninety days and who was honorably discharged and has remained loyal to the Government, including the troops mustered into the service of the United States by virtue of the third section of an act approved February thirteen, eighteen hundred and sixty-two, and every seaman, marine, and officer who has served in the Navy of the United States, or in the Marine Corps, during the rebellion, for ninety days, and who was honorably discharged, and has remained loyal to the Government, shall, on compliance with the provisions of this chapter, as hereinafter modified, be entitled to enter upon and receive patents for a quantity of public lands not exceeding one hundred and sixty acres, or one quarter-section, to be taken in compact form, according to legal subdivisions, including the alternate reserved sections of public lands along the line of any railroad or other public work not otherwise reserved or appropriated and other lands subject to entry under the homestead laws of the United States, but such homestead settler shall be allowed six months after locating his homestead and filing his declaratory statement within which to make his entry and commence his settlement and improvement.”

It becomes in this connection an interesting and important inquiry whether these troops, known as the “enrolled Missouri militia,” are to be considered as having been soldiers who served in the Army of the United States, and, further, whether they are to be considered as having been honorably discharged therefrom, as upon these facts rests the question whether they are or not entitled to the benefits of this section in regard to homesteads.

It is to be observed in considering this subject that these troops are not embraced within the phrase in that section “including the troops mustered into the service of the United States by virtue of the third section of an act approved February thirteen, eighteen hundred and sixty-two.” These latter

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were militia who had been specially authorized (to a certain number) to be organized for service in particular States, including the State of Missouri.

The militia which are the subject of your inquiries were not, in my opinion, soldiers who served in the Army of the United States. They were soldiers who served in a force which co-operated with the Army of the United States. The Government could not exercise over them any control in regard to its general military operations. The only service they were required to render was in the immediate defense of their State.

Again, they were never mustered into the service of the United States, and were never treated as troops of the United States by payment for their services from the United States. They were paid by the State whose troops they were; and, although reimbursement was made to the State for such payment, it was a reimbursement to her of an expenditure made upon her own troops who had rendered valuable service to the United States. In the first section of the act providing for such reimbursement, which is dated April 17, 1866 (14 Stat., 38), they are described as State forces "called into service in said State * * * to act in concert with the United States forces in the suppression of rebellion against the United States." In the second section, in providing for the items of expenditure which are to be allowed to the State, it is enacted that the commissioners to be appointed under the first section shall proceed "to examine all the items of expenditure made by said State for the purposes therein named, allowing only for disbursements made and amounts assumed by the State for enrolling, equipping, subsisting, and paying such troops as were called into service by the governor at the request of the United States department commander commanding the district in which Missouri may at the time have been included, or by the express order, consent, or concurrence of such commander, or which may have been employed in suppressing rebellion in said State, under the authority and command of Federal officers." The whole act treats this body of troops as one not properly belonging to the Army of the United States, but as a force which co-operated with that Army.

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If it had been intended to give to this militia the benefits of section 2304 of the Revised Statutes, it is difficult to understand why they should not have been named among the troops referred to in the third section of the act of February 13, 1862, which were also militia.

It would seem that in the State of Missouri during the war there were three classes of troops co-operating for its defense and the suppression of the rebellion therein; first, the regular and volunteer troops, which composed a part of the Army of the United States; second, the militia troops authorized under the act of February 13, 1862; and, third, the "enrolled Missouri militia," which are the troops whose status we are now considering.

In a subsequent act of March 3, 1873 (17 Stat., 566), upon the subject of pensions, notwithstanding the enumeration of those entitled to the benefits of the act (Rev. Stat., sec. 4693) embraces more than that in regard to homesteads, still it was deemed necessary to make an express extension of its advantages to the troops we are discussing, which will be found in section 4722 of the Revised Statutes, enacting that the provisions in reference to pensions "are extended to the officers and privates of the Missouri State militia and the provisional Missouri militia." By the "provisional Missouri militia" in that clause I understand what is known elsewhere as the "enrolled Missouri militia."

The representations made and facts stated in the papers submitted to me show undoubtedly a meritorious claim on the part of the officers and men to whom they refer, and indicate many reasons why they might properly have been included within the benefits of the homestead acts; but, as my duty is to construe the law simply, I am of opinion that they cannot receive such benefits without further legislation. Whether in justice to them further legislation should take place upon the subject is not a matter for me here to discuss.

In direct answer to your two inquiries, therefore, I have to say that in my opinion the persons who served in the "enrolled Missouri militia" did not constitute a part of the Army of the United States, but were a force acting from time to time in co-operation with it. Second, that an order disbanding such troops cannot be considered the equivalent of an

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honorable discharge in the sense in which those words are used in section 2304 of the Revised Statutes. They were never mustered into the service of the United States; consequently they were never mustered out of service. While an order disbanding an irregular body of troops is a discharge entirely creditable to the persons who are thus disbanded, it is not an honorable discharge within the meaning of the section referred to.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. CARL SCHURZ,

Secretary of the Interior.

CHELSEA NAVAL HOSPITAL GROUNDS.

The Secretary of the Navy has no authority to grant to the city of Chelsea, Mass., a right to construct and maintain a sewer upon the grounds of the United States naval hospital at that place. To authorize the grant of such right an act of Congress is necessary.

DEPARTMENT OF JUSTICE,

October 1, 1878.

SIR: In answer to yours of the 23d ultimo, inclosing a copy of a letter from the Hon. Leopold Morse, and asking my opinion as to the power of the Secretary of the Navy to grant authority for the construction of a proposed extension of the main sewer of the city of Chelsea through the grounds belonging to the United States naval hospital at that place, I have the honor to say that he has not authority by virtue of his custody of such institution to grant permission to make such an extension so as to confer any legal title or right upon the city of Chelsea to maintain the sewer within the grounds referred to. A mere license for the use of the grounds may be granted by him; but this, from its very nature, is revocable at all times either by himself, his successors, or any other officer of the United States having lawful charge of the property. In order that a legal right should be given to the city of Chelsea to construct and maintain its sewer through the Government grounds, an act of Congress would be necessary.

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Of course, if the Secretary, as a matter of mere administration, should feel that he could with propriety grant such a license as that referred to, and the city of Chelsea should be satisfied that it would afterwards obtain authority from Congress to maintain its sewer through such grounds, he might permit the work to go on, especially if there should be reserved to the United States the right to avail itself of the accommodations afforded by the structure in the hospital building. These, however, are matters of administration only, which I merely suggest. The only question properly before me is the one of law, which I have answered.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. R. W. THOMPSON,

Secretary of the Navy.

IMPROVEMENT OF SOUTH PASS OF THE MISSISSIPPI.

The Secretary of War is authorized, under section 3 of the act of June 19, 1878, chap. 313 (the requirements of the statute being complied with), to draw his warrant in favor of James B. Eads to pay for materials furnished, labor done, and expenditures incurred during the month, without regard to other parties claiming to be his assignees.

The introduction of the word "assigns" in the acts of March 3, 1875, chap. 134, and June 19, 1878, chap. 313, relating to the work undertaken by Mr. Eads (as, *e. g.*, in the following clauses of the former act: "to pay to said Eads, or to his assigns or legal representatives," "payable to said Eads, his assigns, and legal representatives," "shall be released and paid to said Eads, his assigns, or legal representatives"; and also in the following clauses of the latter act: "in favor of James B. Eads, his assigns, or legal representatives," "in favor of said James B. Eads, his lawful assigns, or legal representatives," &c.), was not intended to withdraw the transfer or assignment of claims arising thereunder from the operation of the general law respecting transfers or assignments of claims against the United States, contained in section 3477 Rev. Stat.

Where the word "assigns" occurs in those acts, it is used in a cognate sense with the words "legal representatives" with which it is associated. It means assignees in law—that is, those upon and in whom the right is devolved and vested by law, such as assignees in bankruptcy.

The "relinquishment of all claim to the deferred payment," required by the third section of said act of June 19, 1878, to be filed with the Sec-

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retary of War, need be given by no one except Mr. Eads himself in order to secure to the United States a full and complete discharge of, or a bar to, so much of the claim as is relinquished.

DEPARTMENT OF JUSTICE,
October 3, 1878.

SIR: Yours of August 21 informs me that under section 3 of an act approved June 19, 1878, Mr. James B. Eads has applied for your warrant for a certain sum to pay for materials furnished, labor done, and expenditures incurred during the month of June, and that certain parties under the name of the South Pass Jetty Company claim that they are assignees of said Eads and entitled to a part of said sum.

In connection with this statement you inquire whether the requirements of said act as to estimates and other preliminaries being complied with, you should draw your warrant in favor of James B. Eads without regard to other parties, or whether you should recognize the assignees; further, who, or what parties, in the order of sequence, should severally or jointly be required to execute the instrument of relinquishment of "all claim to the deferred payment" in order to secure to the United States a full and complete discharge of, or a bar to, so much of the claim as is relinquished by such instrument, the said relinquishment being required by the act of June 19, 1878.

The general rule in regard to transfers or assignments of claims upon the United States is found in section 3477 of the Revised Statutes, which enacts that "all transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof." * * *

This general provision of law would undoubtedly furnish an answer to your inquiries, unless some different provisions controlling it are to be found in the statutes in relation to

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Mr. Eads' contract. These are embraced in the fourth and subsequent sections of the act of March 3, 1875 (18 Stat., 463), and in the act of June 19, 1878.

By examining the fourth section of the act of 1875 it will be seen that it was contemplated that Mr. Eads might associate with him in the contract with the United States other persons if he so desired. This was never done, and it is not understood that the South Pass Jetty Company claim any interest in the contract itself as associates. Their claim is, as stated by you, upon the ground that they are his assignees.

On examining the sections of said act subsequent to the fourth, it will be seen that by one of them the amount agreed to be paid is to be paid "to said Eads, or to his assigns or legal representatives"; and in a subsequent clause of the same section, relating to the amount which is to be held as security by the United States, interest on the same is spoken of as "being payable to said Eads, his assigns, and legal representatives."

In the next section which provides for the payment to be made upon the channel having been maintained at a depth of 30 feet and a width of 350 feet for a period of ten years, the language is "shall be released and paid to said Eads, his assigns, or legal representatives."

The next section, which provides for extra expenditures upon the work in order to maintain the above depth and width of channel, directs the Secretary of War to pay from the money held by him in pledge "to said Eads, or his legal representatives."

A subsequent section provides for the prosecution of the work in case of the disability of Mr. Eads, and enacts that it may be "completed by his legal representatives and his associates aforesaid."

The next subsequent section to the one last quoted provides that the Secretary of War shall, as the said Eads and his associates may, from time to time, have fulfilled on their part the conditions of the act, "draw his warrants upon the Treasurer of the United States in favor of said Eads, or his legal representatives, in payment of the aforesaid amounts as they respectively become due by the provisions of this act." This it will be observed applies to all the payments to be made.

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The last section of the same act, which reserves to the United States the right of discharging its obligations to Mr. Eads in money or bonds, enacts that such bonds shall issue "to said Eads or his legal representatives, in payment at par of the aforesaid warrants of the Secretary of War, unless," &c.

In the act of June 19, 1878, section 2, which provides for the payment of \$500,000, directs the Secretary of War to draw his warrant "in favor of James B. Eads, his assigns, or legal representatives."

The third section, which provides for a further payment, directs the Secretary of War to draw his warrant "in favor of said James B. Eads, his lawful assigns, or legal representatives." But the first proviso in this section directs the certified statements of the work to be filed by "said Eads, or his legal representatives." The second and third provisos, relating to the relinquishment of the deferred payments, uses the phrase "said Eads, his lawful assigns, or legal representatives," the third proviso further directing payment "to said Eads, his lawful assigns, or legal representatives," and providing that "all other payments to said James B. Eads, his lawful assigns or legal representatives, are to be made under and in pursuance of the provisions of the hereinbefore recited act," which is the act of March 3, 1875.

It is understood that the argument that these sections control the general law in regard to transfers and assignments of claims against the United States forms the basis of the contention of those who claim to be assignees of Mr. Eads that they have a right to a part of the payment to him and to have their assignment considered and passed upon before such payment is made.

An examination of the various places in which the terms "Eads, his assigns, or legal representatives," and "Eads, or his legal representatives," are found, satisfactorily shows that Congress used the phrases as meaning the same thing, and that it was not its intention by introducing the word "assigns" into some of the phrases to change the general law upon the subject of assignments.

This will be quite strikingly seen by observing that the section which is the last but one in the act of March 3, 1875,

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provides for the drawing of his warrants by the Secretary of War upon the Treasurer of the United States "in favor of said Eads, or his legal representatives," while the act of June 19, 1878, when it refers to the payments to be made under the act of 1875, speaks of them as payments to be made to "James B. Eads, his lawful assigns, or legal representatives."

It would seem to be quite clear that Congress by the third section of the act of 1878 had no intention to change the mode of payment by warrants as prescribed in the act of 1875, and that the difference of phraseology in the two acts was deemed immaterial.

If it be considered that some meaning must be attached to the word "assigns" in the phrase "lawful assigns or legal representatives" where that phrase occurs in the two acts, it is to be understood as used in a cognate sense with the words "legal representatives" with which it is associated, and which in their ordinary sense are synonymous with executors or administrators. As thus construed it means not assignees in fact or those to whom an assignment has been made by a party holding a claim, but assignees in law; that is, those upon whom the right is devolved by law and in whom it is thus vested, as assignees in bankruptcy.

This is the sense attributed to a similar phrase in regard to claims which may be prosecuted before the Court of Claims in the case of *The United States v. Gillis* (95 U. S. Rep., 407).

There is no necessary implication from the use of these words in the statutes relating to Mr. Eads' contract of any intentional repeal of the general law which Congress has established in regard to the right of the Government to deal solely with those persons with whom it contracts. Implied repeals are not favored, and the implication cannot be made unless the enactment is so clearly repugnant to the former law that a repeal of it is necessarily to be inferred. Where two acts can stand together both must be considered to be in force. (*United States v. Gillis*, supra.)

In direct answer to your inquiries, therefore, I state that, the requirements of the acts being complied with, you are authorized to draw your warrant in favor of James B. Eads without regard to other parties, and that it is not necessary that you should recognize the assignees; further, that no one

Entry of Dutiable Merchandise.

is required to execute the instrument of relinquishment of "all claim to the deferred payment" in order to secure to the United States a full and complete discharge of, or a bar to, so much of the claim as is relinquished by such instrument except Mr. Eads himself.

Very respectfully, your obedient servant,

CHAS. DEVENS.

HON. GEORGE W. MCCRARY,
Secretary of War.

ENTRY OF DUTIABLE MERCHANDISE.

Section 2900 Rev. Stat. does not apply to an entry made in the absence of a certified invoice, upon affidavit, under the provisions of sections 9 and 10 of the act of June 22, 1874, chap. 391. The terms "original invoice," employed in section 2900, mean the consular invoice only.

Where the value in such an entry is falsely stated or concealed, with a view to defraud the revenue, this would be an offense punishable under section 12 of said act of 1874. A forfeiture would also be incurred under section 2864 Rev. Stat.

No provision exists giving the importer a right to make an addition to the value stated in the *pro forma* invoice permitted by the act of 1874.

DEPARTMENT OF JUSTICE,

October 4, 1878.

SIR: Yours of the 12th ultimo states that Messrs. Baldwin, Sexton & Peterson imported into New York certain diamonds which they wished to enter on the first day of last May under the act of June 22, 1874, chap. 391, the invoices certified by the consul not having come to hand. Accordingly, a statement in the form of an invoice was made, giving the value as 21,550 francs. The member of the firm who made this statement discovered that he had made a mistake as to the value of the articles, and went back to the custom-house the same day to rectify it by adding 7,000 francs to the value. He was not permitted to make the correction, because the duty had been deposited about twenty minutes before by the firm's broker (though no landing-permit had been granted), and the collector considered that section 2900 of the Revised Statutes prohibited any amendment under these circumstances. The goods were subsequently appraised at 27,264.45 francs, and

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so reported with an additional duty or penalty of 20 per cent., under section 2900, which provides that "the owner, consignee, or agent of any merchandise which has been actually purchased, or procured otherwise than by purchase, at the time, and not afterward, when he shall produce his original invoice to the collector and make and verify his written entry of his merchandise, may make such addition in the entry to the cost or value given in the invoice as in his opinion may raise the same to the actual market value or wholesale price of such merchandise at the period of exportation to the United States in the principal markets of the country from which the same had been exported, and the collector within whose district the same may be imported or entered may cause such actual market value or wholesale price to be appraised, and if such appraised value shall exceed by 10 per centum or more the value so declared in the entry, then, in addition to the duties imposed by law on the same, there shall be collected a duty of 20 per centum ad valorem on such appraised value. The duty shall not, however, be assessed upon an amount less than the invoice or entered value." The importers denied that the statement in the form of an invoice filed by them May 1 came within the purview of the foregoing section, but claimed that it was provided for by the act of June 22, 1874, which to that extent modified the Revised Statutes. In the act of June 22, 1874, chap. 391, the pertinent sections, which are the ninth and tenth, read as follows:

"SEC. 9. That, except in the case of personal effects accompanying the passenger, no importation exceeding one hundred dollars in dutiable value shall be admitted to entry without the production of a duly certified invoice thereof as required by law, or of an affidavit made by the owner, importer, or consignee before any officer authorized to administer oaths, showing why it is impracticable to produce such invoice.

"SEC. 10. That no entry shall be made in the absence of a certified invoice upon affidavit as aforesaid, unless such affidavit be accompanied by a statement in the form of an invoice, or otherwise, showing either the actual cost of the merchandise included in such importation, or, to the best of the knowledge, information, and belief of the deponent, the for

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sign market value thereof, which statement shall be verified by the owner, importer, consignee, or agent desiring to make entry of the merchandise, and which oath shall be administered by the collector or his deputy." (18 Stat., 188.)

To secure payment of the proper duties the importers gave bond to produce the consular invoice and pay whatever remained due within six months from May 1, 1878.

Upon these facts you ask:

"First. Does Rev. Stat., sec. 2900, apply to an entry made in the absence of a certified invoice in the manner prescribed by the act of June 22, 1874, or, in other words, does the original invoice in Rev. Stat., sec. 2900, mean the *pro forma* invoice, such as was filed in this case, or the consular invoice?

"Second. If it should be held not to apply, what penalty is imposed by law for an undervaluation in an entry made in the manner prescribed by the act of 1874?

"Third. Where an entry is made in the manner prescribed by the act of June 22, 1874, within what limit of time has an importer the right to make an addition to the sum declared in the entry?"

1. In my judgment, section 2900 of the Revised Statutes does *not* apply to the case of an entry made under the act of June 22, 1874 (chap. 391), in the absence of a certified invoice. "Original invoice," as used in that section, means only the consular invoice, and not such a statement in the form of an invoice as was prepared in this case.

In his Law Dictionary (vol. 2, p. 633), Burrill quotes from Jacobson's Sea Laws, 302, this definition of invoice: "Invoice (from Fr. *envoyer*, to send); a list or account of goods or merchandise sent or shipped by a merchant to his correspondent, factor, or consignee, containing the particular marks of each description of goods, the value, charges, and other particulars." See also McCulloch's Com. Dict., and the acts of March 2, 1799 (1 Stat., 655), and of March 3, 1865 (13 Stat., 493).

The paper filed May 1, 1878, by Baldwin, Sexton & Peterson, did not purport to be such a document as is thus described. It was made and accepted only as a temporary substitute for the regular invoice, which is the only instrument covered by the language of section 2900 of the Revised Statutes. This

Entry of Dutiable Merchandise.

was to be produced when obtained, and bond was given to secure its production.

2. If there be an honest mistake as to value in the paper authorized by the act of June 22, 1874, this will be perceived and corrected upon the production of the "original invoice," the importer's bond being conditioned (as you state) for the payment of such duties as are due above the estimate made at the time of entry.

If the value is dishonestly stated or concealed, the twelfth section of this act of 1874 (18 Stat., 188) applies. This punishes with fine and imprisonment, and a forfeiture of the goods, any one "who, with intent to defraud the revenue, shall make or attempt to make any entry of imported merchandise by means of any fraudulent or false invoice, affidavit, letter, or paper, or by means of any false statement, written or verbal, or who shall be guilty of any willful act or omission, by means whereof the United States shall be deprived of its lawful duties, or any portion thereof," &c.

Section 2864 of the Revised Statutes would also cover such a case.

3. The act of 1874 initiated a mode of procedure entirely distinct from that described in section 2900 of the Revised Statutes. The act of 1874 contains no provision for any addition to the *entry*, which indeed could not be done, because the entry is completed before the consular invoice is received, and is made under this act only because of the absence of such invoice. If the invoice states a higher value than that at which an importation was appraised, the bond secures payment of the duty upon such excess; if the appraisal be more than 10 per cent. above the consular invoice, no increase of duty by way of penalty is imposed; but section 12 of the act of 1874 punishes with fine and imprisonment, and with a forfeiture of the goods, any attempt to defraud in making entry under the provisions of that act.

The addition authorized by section 2900 is made by the importer to the valuation of his consignor; whereas, the statement of value in the *pro forma* invoice permitted by the act of 1874 is wholly that of the importer, made in order to effect an entry, and therefore he can have no occasion nor opportunity to add thereto. His right to correct a mistake would

Employment of the Military as a Posse.

be entirely different from the addition provided for by that section. He might wish to correct an error to avoid the imputation of fraud, but is subject to pay no higher duty if by honest mistake he states the value more than 10 per cent. too low.

The briefs sent with your communication have been carefully considered, and are returned with the other papers which accompanied them.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. JOHN SHERMAN,

Secretary of the Treasury.

EMPLOYMENT OF THE MILITARY AS A POSSE.

Under section 27 of the act of September 24, 1789, chap. 20, United States marshals derived an implied authority to summon the military forces of the United States as a *posse comitatus* to aid them in the execution of process, the exercise of which authority was sanctioned by long practice. But no express authority thus to summon the military forces is given by any law; and section 15 of the act of June 18, 1878, chap. 263, prohibits the employment of any part of the Army as a *posse comitatus*, except where such employment is "expressly authorized by the Constitution or by act of Congress."

Held, accordingly, in a case where an organized, armed, and fortified resistance to the execution of the law existed, that the marshal cannot be aided by the military forces of the United States as a *posse comitatus*. The military forces may, however, be used in such case by direction of the President, under the provisions of sections 5298 and 5300 Rev. Stat., should he deem proper to take certain preliminary steps therein provided and if resistance to the law shall thereafter continue.

DEPARTMENT OF JUSTICE,

October 10, 1878.

SIR: Referring to your letter inclosing to me certain papers from the Commissioner of Internal Revenue indicating the existence of organized, armed, and fortified resistance to the collector of internal revenue in Baxter County, Arkansas, which, from its nature, seems to demand a regular military force to suppress it, and inquiring what steps the Department can legally take to enforce the laws, and whether the facts presented furnish a case, under the laws of the United States

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where a military force may be called in to assist our officers, I have the honor to reply :

It has been the practice of the Government since its organization (so far as known to me) to permit the military forces of the United States to be used in subordination to the marshal of the United States when it was deemed necessary that he should have their aid in order to the enforcement of his process. This practice was deemed to be well sustained under the twenty-seventh section of the judiciary act of 1789, which gave to the marshal power "to command all necessary assistance in the execution of his duty," and was sanctioned not only by the custom of the Government, but by several opinions of my predecessors. Instructions given by my predecessor, the Hon. William M. Evarts, of date August 20, 1868, state particularly the authority of the marshal in this regard, and call attention to the fact that the military in such case obey the summons of the marshal as a *posse comitatus* and act in subordination and obedience to the civil officer in whose aid in the execution of process they are called, and only for the object of securing its execution.

While the right to summon a portion of the military forces where it can be spared for the duty, as a part of the *posse comitatus*, is fairly to be inferred from the provision in the judiciary act which I have already quoted, there is found, however, no express authority by which the marshal may summon any military force of the United States as a part of the *posse comitatus*. The fifteenth section of the act of June 18, 1878, enacts: "From and after the passage of this act it shall not be lawful to employ any part of the Army of the United States as a *posse comitatus*, or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress."

In this state of legislation I am of opinion that the marshal cannot be aided by the military forces of the United States as a *posse* in the execution of his process, upon the state of facts as it now appears. This state of facts will, however, enable the forces to be used for the enforcement of the laws, if the President shall deem proper to take certain additional steps, and if resistance to the laws shall thereafter continue.

Employment of the Military as a Posse.

Section 5298 of the Revised Statutes provides: "Whenever, by reason of unlawful obstructions, combinations, or assemblages of persons, or rebellion against the authority of the Government of the United States, it shall become impracticable, in the judgment of the President, to enforce, by the ordinary course of judicial proceedings, the laws of the United States within any State or Territory, it shall be lawful for the President to call forth the militia of any or all the States, and to employ such parts of the land and naval forces of the United States as he may deem necessary to enforce the faithful execution of the laws of the United States, or to suppress such rebellion in whatever State or Territory thereof the laws of the United States may be forcibly opposed or the execution thereof forcibly obstructed.

Section 5300 is as follows: "Whenever, in the judgment of the President, it becomes necessary to use the military forces under this title, the President shall forthwith, by proclamation, command the insurgents to disperse and retire peaceably to their respective abodes, within a limited time."

If, therefore, the facts now present a case which, in the judgment of the President, justify him in so doing, he may issue his proclamation commanding the insurgents to disperse and retire peaceably to their respective abodes within a limited time, and, if they shall fail to do so, it will then be lawful for him to employ such parts of the land forces of the United States as he may deem necessary to enforce the laws of the United States.

In regard to the case immediately before us, I would respectfully suggest, however, that with the force at the command of the collector, with such aid as the marshal may be able to give, a resolute and determined effort should be made to execute the laws of the United States in the county referred to before advising the President to issue his proclamation calling upon the insurgents to disperse.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. JOHN SHERMAN,
Secretary of the Treasury.

Marshal's Fees—Service of Process.

MARSHAL'S FEES—SERVICE OF PROCESS.

Section 7 of the act of February 22, 1875, chap. 95, in prohibiting "any allowance for mileage or travel not actually and necessarily performed under the provisions of existing law," does not modify the provisions of section 829 Rev. Stat., in so far as they fix the rate, determine the mode of computation, and limit the compensation of marshals for the service of process. It leaves the marshal entitled to the same compensation for travel for the service of any and every writ to which he would be entitled under those provisions in the absence of that prohibition, if travel has been actually and necessarily performed by him in serving the writ. Where a marshal travels with several writs in his hands, to be served at the same place, he actually and necessarily travels to serve each of them, within the meaning of section 7 of said act.

Held, accordingly, that a marshal is entitled to full mileage on each writ served by him when several writs issued in behalf of the Government, to be served on different persons, are or might be served at the same time, only one travel being necessary to make the service on all such persons—where the travel is actually performed. Opinion of May 29, 1876 (15 Opin., 108), overruled.

DEPARTMENT OF JUSTICE,

October 10, 1878.

SIR: Your letter of the 25th ultimo refers to an opinion from this Department dated the 29th of May, 1876, given by the then Acting Attorney-General in answer to a call from the Secretary of the Treasury upon the question "Whether a marshal of the United States is entitled to full mileage on each writ served by him when several issued in behalf of the Government, to be served on different persons, are or might be served at the same time, only one travel being necessary to make the service on all of said persons?" and also directs my attention to an opinion since pronounced by the United States district judge of Kentucky upon the same subject, in which latter opinion the statutory provision giving rise to the above question receives a construction widely different from the construction put upon it in the former opinion. In view of the diversity of opinion thus shown respecting a point of great practical importance to the proper adjustment of the accounts of marshals, and at the suggestion of the First Comptroller of the Treasury, you in the same letter request a reconsideration of that question by this Department. I have now the honor to communicate to you the result of an examina-

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tion of the question made by me in compliance with your request.

Section 829 of the Revised Statutes makes provision for mileage of marshals in serving process as follows: "For travel, in going only, to serve any process, warrant, attachment, or other writ, including writs of subpœna in civil or criminal cases, six cents a mile, to be computed from the place where the process is returned to the place of service, or, when more than one person is served therewith, to the place of service which is most remote, adding thereto the extra travel which is necessary to serve it on the others. But when more than two writs of any kind required to be served in behalf of the same party on the same person might be served at the same time, the marshal shall be entitled to compensation for travel on only two of such writs." * * *

By a proviso in the first section of the act of June 16, 1874 (18 Stat., 72), it was enacted: "That only actual traveling expenses shall be allowed to any person holding employment or appointment under the United States, and all allowances for mileage and transportation in excess of the amount actually paid are hereby declared illegal." * * *

This enactment was held to extend to marshals, and therefore to supersede the provision in section 829 of the Revised Statutes allowing mileage to those officers (14 Opin., 681).

But subsequently, by the seventh section of the act of February 22, 1875 (18 Stat., 334), Congress declared that the proviso in the act of June 16, 1874, cited above, "shall not be construed to apply, or to have applied, to attorneys, marshals, or clerks of courts of the United States, their assistants or deputies." * * * "And from and after the 1st day of January, 1875, no such officer or person shall become entitled to any allowance for mileage or travel not actually and necessarily performed under the provisions of existing law."

The effect of the enactment just mentioned, in so far as marshals are concerned, was to restore the provision in section 829 of the Revised Statutes allowing them mileage, without producing any modification thereof other than that which may have necessarily resulted by force of the last clause of such enactment, viz, that "no such officer or person shall

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become entitled to any allowance for mileage or travel not actually and necessarily performed under the provisions of existing law." The inquiry accordingly is, whether this clause forbids the allowance of mileage to a marshal on each writ where two or more writs issued in behalf of the Government, to be served on different persons, at the same place, are there served by him, only one journey being necessary to serve them?

It is to be observed that in regard to mileage section 829 makes no distinction between process issued in behalf of the Government and that issued in behalf of individuals. Mileage is provided by that section "for travel, in going only, to serve any process, warrant, attachment, or other writ, including writs of subpoena in civil or criminal cases," the provision applying alike to cases in which the Government is concerned and to cases of individuals. Hence the circumstance that the writs in the case presented by the inquiry under consideration were issued in behalf of the Government is unimportant.

The same section also provides that the mileage shall be "computed from the place where the process is returned to the place of service, or, when more than one person is served therewith, to the place of service which is most remote, adding thereto the extra travel which is necessary to serve it on the others." And under the general provisions of that section the marshal must be deemed to be entitled to mileage, thus computed, on each and every writ served by him, irrespective of the number served at any time or place, with the exception of one case, which is withdrawn from their operation by being made the subject of a specific provision. That case is "when more than two writs of any kind required to be served in behalf of the same party on the same person might be served at the same time." In such case it is provided, by section 829, "the marshal shall be entitled to compensation for travel on only two of such writs." As is well remarked by the district judge of Kentucky, in the opinion hereinbefore referred to, this limitation implies that the marshal is entitled, under the other provisions of the section, to compensation for travel in going to serve any number of

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writs, provided that they are issued in behalf of different parties, or are to be served on different persons.

But the provisions of section 829 are to be read in connection with the provision in the act of February 22, 1875, already cited, which prohibits any allowance of mileage to the marshal "for travel not actually and necessarily performed under the provisions of existing law."

In the former opinion from this Department, to which reference has been made, the last-mentioned provision is regarded as permitting but one charge for mileage upon several writs in hand at the same time, requiring the marshal to travel to the same place to serve them. This view apparently rests upon the idea that, in such case, the marshal actually and necessarily travels to serve but one of the writs; that with respect to each of the other writs the travel is constructive; and that it was the purpose of the provision to take away constructive mileage.

While I concur in that view as to the purpose of the provision in the act of 1875, I feel compelled to differ therefrom as to its application to the case where two or more writs are served by the marshal at the same time and place. It is true that in such case but one journey may have been "actually and necessarily performed" to serve all the writs; yet the travel was none the less actual and necessary for the service of each; so that here we cannot regard the travel as constructive with respect to any of the writs.

As has just been intimated, where several writs, issued in behalf of different parties, are received by the marshal at the same time, and are to be served on different persons residing in the same place, the journey which is undertaken to serve these writs is as necessary for any particular one of them as it is for either of the others. If it had been the design of Congress to limit the compensation of the marshal to mileage upon but one writ in a case of this kind, the provision referred to would doubtless have been accompanied by some regulation for determining on which of the writs the mileage should be allowed or taxed, whether on the one first placed in the marshal's hands or on the one first served, &c. It is not likely that a matter of such concern to litigants would have been left to the arbitrary determination of the marshal him-

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self. But the case of several writs issued in behalf of the same party (whether such party be the Government or an individual) against different persons stands on precisely the same footing, when viewed in connection with the provision in the act of 1875, as the case of several writs issued in behalf of different parties; and I am unable to find in that provision anything inconsistent with the allowance of mileage on each of the writs issued and served in either of those cases when actual travel has been performed by the marshal in serving them.

That provision was intended to apply to cases in which no actual travel is performed in serving process, as, for instance, where the writ is sent through the mail to be served by a deputy at or near the place of service. It was well known to Congress that under the fee bill the practice of thus serving writs and charging mileage therefor, as if travel had been actually performed to serve them, prevailed. The claim of an allowance for travel for such service—the travel being in fact constructive only—was regarded as an abuse. To remedy this, and to confine the allowance of mileage to cases in which there has been actual travel, it is believed the provision in the act of 1875 was enacted.

The result at which I arrive is that that provision produces no modification of the provisions of section 829 in so far as they fix the rate, determine the mode of computation, and limit the compensation of the marshal for the service of process. It leaves him entitled to the same compensation for travel for the service of any and every writ to which he would be entitled under the latter provisions in the absence of the former provision, provided that travel has been actually and necessarily performed by him in serving the writ. I have already observed that where he travels with several writs in his hands to be served at the same place he actually and necessarily travels to serve each and all of them.

To the question submitted for reconsideration I accordingly return this answer: That, in my opinion, a marshal is entitled to "full mileage on each writ served by him, when several issued in behalf of the Government, to be served on different persons, are or might be served at the same time, only

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one travel being necessary to make the service on all of said persons, where such travel is actually performed."

I am, sir, very respectfully,

CHAS. DEVENS.

Hon. JOHN SHERMAN,

Secretary of the Treasury.

DESERTION FROM THE MILITARY SERVICE.

Opinion of Attorney-General Taft, of September 1, 1876 (15 Opin., 152), in regard to the application to the offense of desertion of the limitation provided in the one hundred and third Article of War, the nature of that offense, and the time when the limitation begins to run in favor of the deserter, the scope and effect of the exception contained in that article preventing the limitation from running in certain cases, the operation of the forty-eighth Article of War with respect to the deserter's term of service, &c., reaffirmed.

The exception from the limitation contained in the one hundred and third Article of War (viz, when, by reason of having absented himself, or of some other manifest impediment, the accused shall not have been amenable to justice within the period mentioned) does not produce any effect where the limitation itself would not otherwise run. Hence absence without leave *during the term of enlistment*, in the case of a deserter, is unimportant, inasmuch as, the offense of desertion being a continuing one during such term, the limitation would not otherwise begin to run until the expiration thereof.

Where the absence of the deserter continues after his term of service has expired, no presumption of law arises that he was not amenable to justice during such absence, and that his case is accordingly within the exception. The fact must be shown by evidence submitted at the trial.

Nor is a plea of guilty, when it appears by the record that the order for trial was issued more than two years before the commission of the offense, to be taken as an admission by the accused of the existence of an exception withdrawing his case from the limitation.

It is for the prosecution to show as a matter of fact, in some other way than by the form of the pleadings, that by reason of having absented himself, or of some other manifest impediment, the accused was not amenable to justice within the two years.

DEPARTMENT OF JUSTICE,

October 16, 1878.

SIR: An answer to your inquiries of the 25th ultimo requires that I should restate briefly the conclusions to which my predecessor, the Hon. Alphonso Taft, came in an

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opinion rendered September 1, 1876, to the War Department, in which conclusions I concur.

It was there held :

1. That the limitation provided by the one hundred and third Article of War extends to the offense of desertion.

2. That the limitation begins to run from the period of the commission of the offense; but that desertion is a continuing offense, *i. e.*, an offense the commission of which may continue from day to day, and consequently the limitation dates only from the time when its commission has ceased.

3. That, although a continuing offense, it terminates with the enlistment of the soldier. There being no further duty on his part to render service, there is no continuing crime after that date in failing to render such service.

4. That the provision in the forty-eighth Article of War is to be construed with the other penal provisions relating to the offense of desertion, all of which contemplate a trial and conviction before the infliction of the penalty; that such provision does not of itself operate to extend the term of service originally contracted so as to continue the offense correspondingly, and thus postpone the time when the limitation begins.

5. That under the exception contained in the act of limitation, which withdraws from the operation of the general provision, limiting the period of liability to trial to two years from the commission of the offense, those cases wherein the accused "by reason of having absented himself, or of some other manifest impediment, shall not have been amenable to justice," mere absence without leave would not bring the accused within that exception. It must have been such an absence as rendered him not amenable to justice. It was further held that it is for the court to determine upon the particular facts and circumstances whether the absentee has been so absent that he is not thus amenable.

The first inquiry in your letter is, whether the term of limitation prescribed in the one hundred and third Article of War "runs in favor of deserters during the period of their voluntary absence from the Army; or, in other words, does or does not the fact of absence without leave from the Army

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itself create a legal presumption that the absentee was not amenable to military justice during such absence?"

To this I reply, that if the absence took place during the term of enlistment of the soldier, in such case (as the offense is one which is continuing) it is not important whether he was or was not amenable to military justice during that absence. The exception does not run where the limitation itself would not otherwise run; and in the case supposed the offense still continues, at the termination of which only does the limitation commence.

I infer, however, that your inquiry may possibly be intended to elicit an answer to the question whether, in case the absentee continues his absence without leave from the Army after his term of service has expired, there is such a legal presumption that during such absence he was not amenable to justice.

To this I reply that, in my opinion, no such legal presumption arises. He has ceased, in the case supposed, to be liable to render any service except as the result of a trial and conviction; and no presumption of law can be made that, because he does not voluntarily come forward and surrender himself, he is not therefore amenable to public justice. It is a question of fact in all cases for the court which tries him to determine, when the limitation comes in issue, whether or not it is shown by the Government that the case is not affected by it by reason of the exceptions named therein.

Your second inquiry is whether, if I am of opinion that the limitation is fully applicable to deserters, a plea of guilty on arraignment does or does not cure any legal defect in the record by reason of the date of the order of trial being more than two years subsequent to the time of desertion.

In answer I would say that, as a matter of pleading, when it appears by the record that the order was issued more than two years after the offense was complete, and the defendant pleads guilty of the offense, inasmuch as there are certain exceptions which would do away with the effect of the statute of limitations provided they existed, it must be held that by the plea of guilty the defendant admits the existence of those exceptions, which take his case out of the general statute of limitations.

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In reference to this matter, while such is the technical result of the plea of guilty in the case supposed, I should here call attention to two opinions of my predecessors. Mr. Wirt (1 Opin., 383) holds that the accused cannot be tried by a court-martial after two years from the issuance of the order, even on his own application, unless by reason of absence or some other manifest impediment he shall not have been amenable to justice within the time limited by the Article of War, and this upon the ground that the policy of the Article of War is such that it does not permit a defendant to waive the benefit of the limitation. It is also held by Attorney-General Cushing (6 Opin., 240) that the limitation cannot be waived by the accused. Nor do I find any opinion which contradicts these.

In view of the long time which has elapsed since the first of these opinions was delivered, and from the fact that it must have been well known that it was held that the accused could not waive the benefit of the limitation in his favor contained in the statute, and that public policy demanded a prompt trial of offenders against the Articles of War, this rule should now be followed. Even if the technical result is that which I have indicated, the fact that it is not in the power of the accused to waive the limitation in the statute will require of the Government to prove, in some other way than by his plea or admission at the trial, why he was not brought to trial within two years from the cessation of the offense.

It is therefore for the Government to show, as a matter of fact, in some other way than by the mere form of the pleadings, that by reason of having absented himself, or of some other manifest impediment, he was not amenable to justice within the period of two years.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. GEORGE W. McCRAEY,

Secretary of War.

DISTRICT OF COLUMBIA 3.65 BONDS.

The bonds known as the "District of Columbia 3.65 bonds" are obligations of the United States, for the payment of which the faith of the

District of Columbia 3.65 Bonds.

Government is solemnly pledged. But those bonds are not "United States bonds" within the meaning of sections 5214 and 5215 Rev. Stat. The duty imposed on every national banking association by section 5214 Rev. Stat., of "one-quarter of one per centum each half year on the average amount of its capital stock beyond the amount invested in United States bonds," is a tax upon the *franchise* of the bank, not a tax upon its capital stock. Hence, in determining the quantum of such tax payable by the bank, no deduction can be made from its capital stock of the amount thereof which is invested in any non-taxable property that does not fall under the description of "United States bonds" within the meaning of the statute.

Held, accordingly, that a national banking association, in making returns of the average amount of its capital stock, &c., under section 5215 Rev. Stat., should not be allowed to deduct the amount of capital invested in "District of Columbia 3.65 bonds," although these bonds are, by section 7 of the act of June 20, 1874, chap. 337, "exempt from taxation by Federal, State, or municipal authority."

DEPARTMENT OF JUSTICE.

October 16, 1878.

SIR: Your letter of the 27th ultimo requests an expression of my opinion as to whether, under the provisions of section 5215 of the Revised Statutes of the United States, a national bank, in arriving at the amount of taxable capital stock beyond the amount invested in United States bonds, shall be allowed to deduct the amount invested in fifty years' three-sixty-five funding bonds of the District of Columbia, issued under the act of June 20, 1874.

Section 5214 of the Revised Statutes is as follows:

"In lieu of all existing taxes, every association shall pay to the Treasurer of the United States, in the months of January and July, a duty of one-half of one per centum each half year upon the average amount of its notes in circulation, and a duty of one-quarter of one per centum each half year upon the average amount of its deposits, and a duty of one-quarter of one per centum each half year on the average amount of its capital stock beyond the amount invested in United States bonds."

The first inquiry that is presented in examining this question is, whether the bonds known as the "three-sixty-five District of Columbia bonds" are obligations of the United States.

Upon this question I have no doubt. The act of June 20,

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1874 (18 Stat., chap. 337, p. 116), abolished the then existing government of the District of Columbia, but provided (in the seventh section) that the sinking-fund commissioners of the District, who were then existing in pursuance of previous legislation, should be continued, and made it their duty to cause bonds of the District of Columbia to be prepared, "to be signed by the secretary and treasurer of said sinking-fund commissioners and countersigned by the comptroller of said District." In addition, there was a provision in regard to the pledge of the United States, which, as amended by a subsequent act of February 20, 1875 (18 Stat., chap. 94, p. 332), reads as follows :

"And the faith of the United States is hereby pledged that the United States will, by proper proportional appropriations as contemplated in this act, and by causing to be levied upon the property within said District such taxes as will do so, provide the revenues necessary to pay the interest on said bonds as the same may become due and payable, and create a sinking fund for the payment of the principal thereof at maturity."

The District of Columbia was an expiring corporation, and, as a corporate legal entity, it ceased to exist by operation of this act. The sinking-fund commissioners derived their powers, functions, and authority from the United States, and the issuance of these bonds was the means provided by the United States by which certain liabilities of the District were to be discharged. As the corporation thus ceased to exist, and as the bonds were prepared and issued by the commissioners of the sinking fund under authority from the United States, and the faith of the United States was pledged to provide by legislation for the payment of principal and interest upon the same, as well by proportional appropriations from its Treasury as by causing to be levied upon the property in the District such taxes as would provide the revenues necessary for the payment of the interest on said bonds and create a sinking fund for the payment of the principal at maturity, it must be considered that these are obligations of the United States, to the payment of the interest and principal of which its faith is solemnly pledged.

To use the expression of my predecessor, Attorney-General

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Pierrepont, "There is no way short of a shameless violation of the clearest principles of settled law and honest dealing that the Government can escape from the full payment of these bonds."

While these are obligations of the United States, for the payment of which its faith is solemnly pledged, there remains the inquiry whether they are "United States bonds" within the meaning of the statute before us.

It would seem to be clear that the fact that they are obligations of the United States does not dispose of the question whether they are to be included within the amount exempted under this statute. It would not be contended, for instance, that the "gold and silver certificates," as they are familiarly called, of the United States, which are certificates of indebtedness, to the payment of which the faith of the United States is solemnly pledged, would be exempt under this statute. It must, therefore, be determined whether or not these securities of the District are "United States bonds" within the meaning of the statute.

When the statute of 1864 was passed, and also when it was embodied in the revision, there could have been no reference to any United States bonds except those signed by the Secretary of the Treasury and issued in pursuance of law, as the bonds of the District of Columbia had not at that time been provided for. They were provided for by the act of June 20, 1874, and although the revision passed on June 22, 1874, it did not affect or repeal any act of Congress passed since December 1, 1873, but all such acts were to have full effect as if passed after the enactment of the revision. It could not, therefore, have been within the contemplation of Congress at the time when the act was originally passed, nor at the time of the revision, to include the bonds of the District of Columbia within those exempt from taxation under section 5214 of the Revised Statutes, because they then had no existence. Of course, they could have been included by subsequent legislation.

It is important in this connection to observe that in all the legislation relating to the bonds in question they are never spoken of as "United States bonds," but always as "the bonds of the District of Columbia." Thus they are so called

District of Columbia 3.65 Bonds.

in the act authorizing the sinking-fund commissioners to issue them. They are so termed in the act of February 1, 1875, in regard to the payment of interest upon them; also, in the act of March 3, 1875, "for the support of the government of the District of Columbia." And the same phrase is used in the joint resolution of March 14, 1876, directing the payment of interest upon them. The same phrase is further found in the acts approved July 31, 1876, and March 3, 1877, and in the last statute relating to them, July 11, 1878, they continue to be spoken of as "the bonds of the District of Columbia."

It is, therefore, seen that this legislation, while it continues to recognize the responsibility of the United States for these bonds, is careful always by the term which it affixes to them to distinguish them from the United States bonds properly so called, which are signed by the Secretary of the Treasury (13 Stat., p. 99, sec. 4).

The conclusion to which I arrive upon this point is, that "the bonds of the District of Columbia" are not "United States bonds" within the meaning of section 5214 of the Revised Statutes.

I have considered the inquiry with relation to section 5214 of the Revised Statutes, although your question refers to section 5215, as the expression in the latter must be governed by its use in the former section.

As the purpose of your inquiry is to determine whether these bonds are to be treated as United States bonds in arriving at the amount of taxable capital stock of national banks, it is proper to consider whether the fact that the bonds of the District of Columbia are exempt from taxation authorizes their deduction from the amount of capital stock over and above that which is invested in United States bonds properly so called in ascertaining the amount of taxable capital stock.

By the act authorizing these bonds it was provided in the seventh section (part of which I have heretofore quoted) that they "shall be exempt from taxation by Federal, State, or municipal authority, engraved and printed at the expense of the District of Columbia, and in form not inconsistent herewith."

The question is necessarily here presented as to the nature

of the tax which is imposed by section 5214 of the Revised Statutes. The principles by which taxes of this nature are to be decided are reasonably well settled, although the application of them is always attended with difficulty. If the tax in question is to be treated as a tax upon property, it must be deemed that from the property which the bank thus possesses over and above the amount invested in United States bonds all non-taxable property is to be deducted, and thus the District of Columbia bonds are to be deducted. If it is, however, a tax upon the franchise of the bank, that is, upon the privilege given to it of doing business as a national bank, and is thus one of the burdens imposed upon it by reason of such privilege, such property is not to be deducted.

A franchise tax is levied in consideration of the value of the privilege which is given to those who receive the franchise; and although in point of fact they may see fit to invest their funds in non-taxable property, yet, as it is not the fund or the property which is taxed, but the privilege only, the value of that privilege is tested simply by their possession of such property.

For the distinction between a tax on a franchise and a tax on the capital of a corporation as its property, see *Bank of Commerce v. New York City* (2 Black, 620); *Van Allen v. The Assessor* (3 Wall., 573); *Bradley v. The People* (4 Wall., 459); *Provident Institution v. Massachusetts* (6 Wall., 611); *Hamilton Co. v. Massachusetts* (6 Wall., 632); *Minot v. P. W. & B. R. R. Co. et al.* (18 Wall., 206).

The tax of one-half of one per centum each half year upon the average amount of notes of the bank in circulation, and the duty of one-quarter of one per centum each half year upon the average amount of its deposits, are clearly taxes upon the capacity of the bank to do business, and not upon any property which it possesses; and it must be deemed that the tax in question, which is associated with them, of "one-quarter of one per centum each half year on the average amount of its capital stock beyond the amount invested in United States bonds," is a tax not upon the property which the bank owns, but upon its capacity to do business, and thus upon the value of its franchise. Its capacity to do business

Fire Commissioner in the District of Columbia.

is tested by the amount of stock which it possesses beyond the amount which it has invested in United States bonds.

In the opinion of the court in *Van Allen v. The Assessors*, supra, it is said: "In the granting of chartered rights and privileges by Government, especially if of great value to the corporators, certain burdens are usually, if not generally, imposed as conditions of the grant. Accordingly we find them in this charter. They are very few, but, distinctly stated."

The court then proceeds to state the burdens imposed as conditions of the grant, one of which is the tax we are considering, and, it seems to me, fully recognizes it as a franchise tax.

From the operation of such a tax the amount invested in United States bonds is to be deducted by express terms of the statute; but if there be other non-taxable property included in the amount of its capital stock, this is to be embraced within the franchise tax.

It is to be observed in this connection, as tending to show that the tax in question is a franchise tax, that the exemption is not in favor of the United States bonds as such, but of the amount invested in them, which may be an amount considerably larger than the par value of the bonds.

I am compelled, therefore, to come to the result that in estimating the capital stock of national banks which is liable to duty there cannot be deducted therefrom the three-sixty-five bonds of the District of Columbia which they may own.

The franchise tax is imposed without reference to the inquiry whether property is invested in taxable or non-taxable securities.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. JOHN SHERMAN,
Secretary of the Treasury.

FIRE COMMISSIONER IN THE DISTRICT OF COLUMBIA.

The Commissioners of the District of Columbia have not power under the act of June 11, 1878, chap. 180, to abolish the office of the fire commis-

Fire Commissioner in the District of Columbia.

sioner whose appointment is vested in the Secretary of the Interior by the law creating the office (the act of the legislative assembly of the District of Columbia, passed August 21, 1871).

DEPARTMENT OF JUSTICE,
October 17, 1878.

SIR: I have considered the questions submitted for my opinion, in your letter of the 10th instant, and have the honor to reply as follows:

The question is whether the Commissioners of the District of Columbia have power under the act of Congress approved June 11, 1878, to abolish the office of the fire commissioner whose appointment was vested by the law creating the office in the Secretary of the Interior.

The language used in the statute is very broad. The commissioners are authorized "to abolish any office, to consolidate two or more offices, reduce the number of employés, remove from office and make appointments to any office under them authorized by law."

The same power was given to the commissioners appointed under the act of June 20, 1874 (18 Stat., 116, 117), and the same language is employed except the words "under them," which are not in this last cited statute.

It could not have been within the intent of either law to give power to the commissioners to abolish all offices in the District of Columbia, but only such as are held "under them," the incumbent of which they have the authority to appoint. They cannot abolish the offices of police judge, of notaries public, or any other, the appointment to which is vested in the President of the United States or in any other officer of the General Government.

By the thirtieth section of the act of Congress approved February 21, 1871, establishing a government for the District of Columbia, the legislative assembly of the District provided by said act had power by law to provide for the election or appointment of the ministerial officers necessary to carry into effect the laws of said District. In pursuance of this power, the legislative assembly passed the act of August 21, 1871, creating very many offices and authorizing appointments thereto. Among these is a board of seven fire commissioners, one of whom, "who shall represent the interests of the Gen-

Kansas and Neosho Valley Railroad Lands.

eral Government," is to be appointed by the Secretary of the Interior. This law is still in force. It is clear that it was within the power of the local legislature to pass this law. It gives in terms the appointment of one of the fire commissioners to the Secretary of the Interior, adding the reason therefor, viz, that there should be one in the board to represent the interests of the General Government.

As the Commissioners of the District have not the power to appoint the incumbents of this office, it is not held under them, and, in my judgment, it is not within the intent of the act of Congress of June 11, 1878, that they should have the power to abolish it.

I have not considered, nor in the above opinion do I intend to touch, the question which might arise if the Commissioners of the District of Columbia were to abolish or attempt to do away with the entire board of fire commissioners.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. CARL SCHURZ,
Secretary of the Interior.

KANSAS AND NEOSHO VALLEY RAILROAD LANDS.

The words "restored to market," in section 3 of the act of March 3, 1877, chap. 125, entitled "An act to secure the rights of settlers upon certain railroad lands," &c., are controlled by the last clause in same section, viz, "and opened to settlement and purchase under the homestead laws of the United States only." Those words, taken in connection with this clause, signify nothing more than a withdrawal of the lands from the condition of reservation in which they have been held by reason of the railroad grant referred to in the first section of the act.

DEPARTMENT OF JUSTICE,
October 19, 1878.

SIR: Your letter of the 14th instant submits for my official opinion a form of public proclamation involving the construction of the third section of the act of March 3, 1877 (19 Stat., 404), providing for the restoration to market of certain lands in Kansas, heretofore withdrawn for railroad purposes, in connection with a letter of the 11th instant from the Commis-

Kansas and Neosho Valley Railroad Lands.

sioner of the General Land Office upon the subject to which it refers.

The section to which your inquiry relates is as follows :

"That upon said Kansas and Neosho Valley Railroad Company, its successor or successors or assigns, filing with the Secretary of the Interior its acceptance of the terms, conditions, and impositions of this act, as hereinafter provided, and its execution and delivery of the deeds hereinafter specified, all of said lands so withdrawn and undisposed of shall be restored to market, by proclamation of the President of the United States, and opened to settlement and purchase under the homestead laws of the United States only."

That which was to be done previously to the issuance of the proclamation has been done ; and the third inquiry of your letter (which I proceed to discuss) is whether the whole clause is subjected to the limitation of the words "opened to settlement and purchase under the homestead laws of the United States only."

If this is so, the proclamation is required merely for the purpose of declaring the lands subject to entry under the homestead laws, from and after the prescribed date, without offering them at public auction or rendering them subject to public sale. There is an apparent contradiction between the words "restored to market" and the words "opened to settlement and purchase under the homestead laws of the United States only." The general meaning of the words "restored to market" is a restoration to market which opens the lands to public and private sale.

Whenever two clauses are found in the same sentence apparently contradictory, an effort must be made to ascertain which is the governing clause, and whether the subordinate clause cannot be reconciled with it by giving to it a reasonable interpretation, and yet not necessarily one that leaves the sentence contradictory in itself.

In this view, an examination of the act satisfactorily shows that it is not intended to open these lands to the general market. Its title is "An act to secure the rights of settlers upon certain railroad lands, and to repeal" * * * Strictly speaking, settlers upon railroad lands could have no rights. The use of the term by Congress is, however, not infrequent,

ARMY SUPPLIES—Contract for.

when it means to express by it only an equitable claim upon its consideration. "Settler" in this title means an actual occupant, and not, as in some statutes, one who has simply complied with certain forms.

This being the object of the act, when the words "restored to market" are found in connection with the words "and opened to settlement and purchase under the homestead laws of the United States only," no suggestion being made that even pre-emptors, who are a favored class in the legislation, are to have any rights, it must be deemed that the latter clause of the section is the governing clause. The words "restored to market," if they stood alone, would be fairly interpreted to mean a submission of the lands to public and private sale. If these lands were offered at public and private sale, the claims of actual settlers thereto, which Congress has obviously intended to protect, would be defeated.

"Restored to market," in the sense, therefore, in which it is used in this section, when taken in connection with that which I deem the governing clause, means a withdrawal of the lands from the condition of reservation in which they have been held by reason of having been subjected to the railroad grant which has heretofore accompanied them.

In direct answer to your inquiry, therefore, I would say that the draught of the proclamation is not in my view correct, and should be modified in accordance with this opinion.

This answer to your third inquiry renders an answer to your other two unnecessary.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. CARL SCHURZ,

Secretary of the Interior.

ARMY SUPPLIES—CONTRACT FOR.

A contract was made by the Subsistence Department with H. and B., by the terms of which the latter were to furnish 100,000 pounds of tobacco of a certain quality between August 20 and November 30, 1878, in such quantities as might be required; they further agreeing "that if the Subsistence Department shall require more tobacco during the continuance of this contract and prior to the 30th of November, 1878, than

Army Supplies—Contract for.

the 100,000 pounds above stated, they will furnish, subject to the same conditions and at the same price, an additional 150,000 pounds, or any less amount, provided that due notice is given them prior to the 30th of November, 1878, aforesaid." *Held* that, as to the additional quantity of 150,000 pounds, an option exists in favor of the Subsistence Department to receive such additional quantity or not; and that the Department is not, by the provisions in the contract above quoted, precluded from advertising for new proposals, and awarding a new contract for tobacco of a quality superior to that furnished by H. and B. under their contract.

DEPARTMENT OF JUSTICE,

October 18, 1878.

SIR: By your letter of the 16th instant it appears that the Subsistence Department invited, by public advertisement, proposals for supplying the Army with 100,000 pounds of tobacco. The advertisement announced that "the Government will reserve the right to increase the quantity of tobacco to be received any additional amount not exceeding 150,000 pounds, provided due notice is given to the contractor at any time prior to November 30, 1878," and "a copy of this advertisement and these specifications must be attached to and form a part of each proposal."

Proposals were received, and an award made to Harris and Beebe, of Quincy, Ill., who entered into a contract, August 2, 1878, to furnish 100,000 pounds between the 20th of August and the 30th of November, 1878, in such quantities as might be required. This contract contained the following stipulation: "They do further agree that if the Subsistence Department shall require more tobacco during the continuance of this contract and prior to the 30th day of November, 1878, than the 100,000 pounds above stated, they will furnish, subject to the same conditions and at the same price, an additional 150,000 pounds, or any less amount, provided that due notice is given them prior to the 30th of November, 1878, aforesaid."

This contract is still in the course of execution; and you inquire whether the Commissary General of Subsistence, who desires an additional quantity of tobacco to the 100,000 pounds he has engaged to receive from Harris and Beebe, may advertise for new proposals, and award a new contract

Forfeiture under the Internal-Revenue Law.

thereon to the lowest and best bidder, the Commissary-General desiring more tobacco, not of the same quality as that furnished by Harris and Beebe in pursuance of contract, but tobacco of a superior quality.

The contract made with Harris and Beebe is for 100,000 pounds of a certain quality of tobacco, and the stipulation in the agreement simply gives the Subsistence Department the option to receive 150,000 pounds more of the same quality and at the same price upon giving due notice to the contracting parties prior to the date of November 30, 1878. So far as that portion of the contract is concerned, the option is entirely that of the Subsistence Department, and it must be presumed that it has paid the price for that option in the price which it has given for the tobacco which it has contracted to purchase at all events, or in the benefit which the parties have otherwise derived from the contract.

When, therefore, the Subsistence Department desires no more tobacco of the same quality with that furnished by Harris and Beebe, it is under no obligation to request the delivery of the additional 150,000 pounds. The fact that it desires tobacco of another and superior quality cannot compel it to take an additional quantity of tobacco of a quality which it does not desire.

I do not mean to intimate by this that even if the Subsistence Department desired tobacco of the same quality, and believed that it could obtain it better and cheaper than of Harris and Beebe, it may not advertise for an additional 150,000 pounds without exercising the option given to it in the contract made with that firm.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. GEORGE W. McCRARY,

Secretary of War.

FORFEITURE UNDER THE INTERNAL-REVENUE LAW.

Section 3208 Rev. Stat. does not devolve upon the Commissioner of Internal Revenue the charge of real estate forfeited under the internal-revenue laws where the forfeiture is enforced by proceedings *in rem*.

Forfeiture under the Internal-Revenue Law.

But the custody of real estate, acquired in satisfaction of a pecuniary forfeiture arising under those laws, is by that section devolved upon the Commissioner.

DEPARTMENT OF JUSTICE,
October 18, 1878.

SIR: Your letter of the 15th instant calls my attention (at the suggestion of the Acting Commissioner of Internal Revenue) to the following phrase in an opinion of mine delivered to you on the 25th ultimo:

"Examining, in connection with these, the section 3208, it will be seen that sufficient force is given to that section by holding that it refers to real estate derived under provisions relating to fines, taxes, penalties, and forfeitures incurred under the internal-revenue laws themselves," and inquires whether the charge of forfeited real property is devolved on the Commissioner of Internal Revenue by the law as it now exists in section 3208 of the Revised Statutes.

The phrase referred to relates to real estate which is derived under the provisions relating to forfeitures, by reason of judgments of pecuniary forfeitures which have been levied upon real estate, by the set off of the same, or in other modes. There are certain pecuniary forfeitures, unnecessary to be recapitulated, in the internal-revenue laws, which are recovered by suit, and the money for which is afterwards made by levy upon real estate.

In regard to forfeitures of real property, when real property is proceeded against by a process *in rem*, and a judgment is recovered, such property, as I understand the law, is sold by virtue of the decree that forfeits it, in order that out of it may be paid the necessary expenses of the proceeding. If, for any reason, the sale is not made (as it is often adjourned for want of bidders, on account of combinations, &c.), the custody of the property still remains in the court until its order is complied with. Even if the court permits the property to be disposed of by private sale, ratifying such a sale, the custody still remains with the court until the sale is made.

I therefore do not understand that the question as to forfeited realty arises in the form in which it is presented by the Acting Commissioner of Internal Revenue.

Bank Taxation.

If it is desired by the Commissioner of Internal Revenue that the custody of such realty should be in him, legislation such as is intimated has been proposed would seem to be necessary.

Very respectfully, your obedient servant,
CHAS. DEVENS.

Hon JOHN SHERMAN,
Secretary of the Treasury.

BANK TAXATION.

In determining "the average amount invested in United States bonds," under the provisions of section 3403 Rev. Stat., imposing a tax upon the capital employed in the business of banking, and "the amount invested in United States bonds," under the provisions of section 5214 Rev. Stat., imposing a semi-annual duty on national banking associations, the amount thus "invested" is in either case to be ascertained by taking the price actually paid for the bonds. But within the price accrued interest should not be computed, that being a mere temporary investment, which is replaced as soon as the interest becomes due and payable.

DEPARTMENT OF JUSTICE,
October 21, 1878.

SIR: Your letter of the 30th ultimo incloses to me an opinion transmitted from this Department on the 27th of July last, and, at the request of the Commissioner of Internal Revenue, desires a reconsideration of said opinion previously to embodying the same in a circular and acting thereon.

I have the honor to say that I have made such reconsideration, and deem that the result heretofore arrived at is erroneous; and desire therefore that said opinion be treated as overruled.

The inquiry proposed submits the question whether under section 3408 of the Revised Statutes, which imposes a tax upon the capital employed in the business of banking "beyond the average amount invested in United States bonds," when taken in connection with section 5214, which requires every association named in that chapter (entitled "national banks") to pay a duty semi-annually "on the average amount of its capital stock beyond the amount invested in United

Bank Taxation.

States bonds," the "amount (so) invested" is to be ascertained by taking the price paid for these bonds, or the market value of them.

It appears that the Commissioner of Internal Revenue under the first cited section has adopted a different rule from that adopted by the Treasurer of the United States under the last-named section.

The same rule, I have no doubt, applies to both these sections, and the practice of the two officers named should be the same. I can find no ground for the distinction between the one and the other course.

The certainty and uniformity desirable in fixing a basis for taxation is the most prominent argument tending to show that the principal sum payable at the maturity of the bonds is the sum which should be adopted as the one by which the amount invested is to be determined; but in considering the objects of these two sections it will be found that the use of the word "invested" was intended to aid in fixing the amount of taxation, and this for what seems to me satisfactory reasons.

The section 3408 intends to impose an excise tax upon the business of any bank, &c., or any person engaged in banking. That excise is computed by withdrawing from the amount of capital which the party or corporation has employed "the average amount invested in United States bonds."

This is not done with a view of carrying out the law that "United States bonds" shall not be taxable, so much as to test the value of the business which the bank or person does by ascertaining the amount which they have applicable to the ordinary transaction of such business.

The section 5214 is intended to impose upon the national banks a tax in the nature of a franchise tax upon certain average amounts "beyond the average amount invested in United States bonds"; and the value of the franchise enjoyed by the bank is tested by ascertaining the amount of its quick capital which it has over and above that invested in United States bonds, rather than for the reason that United States bonds are not themselves taxable.

If these views of the character of these two taxes are correct, it would seem that force must be given to the word

Cutting or Removal of Timber.

"invested," in order to ascertain the value of the business in the one case upon which an excise is laid, and the value of the franchise in the other which is subjected to a tax.

The fact appears by the communications inclosed in your letter that at certain times the bonds in question have been sold in the market below par, although of late years they have been above par.

The amount invested properly in a thing is the amount paid for that thing, although its actual value may be greater or less than such amount.

In the computation under these two sections it seems to me that it was intended to reach the amount which had been withdrawn from the former active capital to be placed in comparatively permanent investment of United States bonds. In computing the tax which is to be paid either by the banks or persons engaged in banking under section 3408, or the amount imposed by section 5214, it is proper to determine the amount which such persons or corporations actually paid for such bonds.

I am therefore of opinion that the amount so invested is to be ascertained by taking the price paid for the United States bonds. Within the price, I should add, accrued interest should not be calculated, as that is a mere temporary investment which is replaced as soon as the interest becomes actually paid.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. JOHN SHERMAN,

Secretary of the Treasury.

CUTTING OR REMOVAL OF TIMBER.

Sections 4 and 5 of the act of June 3, 1878, chap. 151, entitled "An act for the sale of timber lands in the States of California, Oregon, Nevada, and in Washington Territory," construed in connection with section 2461 Rev. Stat., punishing the cutting or removal of timber growing on the public lands.

DEPARTMENT OF JUSTICE,

October 22, 1878.

SIR: I have carefully considered paragraph 1 of the "Rules and Regulations for the Protection of Timber," &c., trans-

Cutting or Removal of Timber.

mitted with your letter of September 24, in connection with Rev. Stat., sec. 2461, and the two acts of June 3, 1878.

Section 4 of the longer of these two acts merely singles out from the offenses described in section 2461 that of cutting or removing timber "with intent to export or dispose of it," and affixes to it a new and different penalty.

Section 5 simply allows all persons prosecuted for the cutting or removal of timber, "except those who cut or removed with intent to export," to relieve themselves from the penalties prescribed in section 2461 by the payment at the rate of \$2.50 an acre of the land on which the trespasses were committed. The effect of this provision is to release offenders from the penalties incurred for offenses committed under the former law prior to the passage of the new act, on their compliance with the specified conditions; those who cut or removed "with intent to export" being expressly excluded from the benefit of the provision.

I see nothing in the language of the provision that limits its operation to prosecutions actually pending when the act was passed.

The effect of the proviso in section 4, as also of the other act of the same date, is simply to exempt certain specified cases from the operation of the provisions of section 2461. It is a necessary implication from these special provisions that the former law continues in force in respect to all cases to which they do not apply.

I am, therefore, of opinion that paragraph 1 of the rules and regulations transmitted is in accordance with law.

The United States attorney for the district of California has been instructed to be governed in his official action in regard to timber cases by the views expressed in this letter, a copy of which has been forwarded to him.

Very respectfully,

CHAS. DEVENS.

Hon. CARL SCHURZ,
Secretary of the Interior.

Claim of Fabbri & Chauncey.

CLAIM OF FABBRI & CHAUNCEY.

An approved account or voucher for transportation performed for the Navy Department by F. & C., contractors, was issued by the chief of the Bureau of Steam Engineering in favor of and delivered to H. & Son, who were brokers for F. & C. The latter claim that the amount appropriated by the act of June 14, 1878, chap. 191, to pay for the transportation should be paid to them, and not to H. & Son. *Held*, that the account or voucher issued as aforesaid is not a negotiable paper; that a transfer or assignment thereof would be void under section 3477 Rev. Stat.; that the appropriation was made for the purpose of paying F. & C., and not any alleged claim of H. & Son; and that the Navy Department may treat such approved account or voucher as a nullity, and reissue an approved account in favor of F. & C. and transmit it to them directly.

DEPARTMENT OF JUSTICE,

October 23, 1878.

SIR: Your letter of the 19th instant calls my attention to a communication from the firm of Fabbri & Chauncey, of New York, in which they claim, as contractors for whom J. D. Hurlbut & Son were brokers, that the amount appropriated by Congress June 14, 1878, to pay for carrying freight for the Navy Department, should be paid to them, and not to said Hurlbut & Son, to whom (as they claim) the vouchers issued by the chief of the Bureau of Steam Engineering have been erroneously sent.

You request that I will advise you whether an approved account or voucher issued in favor of J. D. Hurlbut & Son is or is not negotiable, and if the pay officer in New York, or other agent of the government to whom such voucher may be presented, is required by law to pay the amount of such voucher to the party to whom it has been assigned by the said brokers. Further, whether the Department, in view of the language of the appropriation act, can legally treat that voucher as void, and recognize only the firm of Fabbri & Chauncey by reissuing approved accounts to them, and not to or through the said Hurlbut & Son.

In reply I would say that such approved account or voucher is not in any proper sense a negotiable paper, and whoever should purchase it would, under all circumstances, take it subject to all the equities that might exist between the Government and the contractor. The Government would not be

Claim of Fabbri & Chauncey.

required by law to pay the amount of such voucher to the party to whom it had been assigned by the brokers if it had itself an equitable claim against the brokers. Nor, if it became satisfied that the account was erroneously approved, would it be the duty of the Government to pay it. This would be the law independently of any statute. But section 3477 of the Revised Statutes makes all transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, "absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof." * * * This is an act of universal application, and covers all claims against the United States in every tribunal in which they may be asserted. (*United States v. Gillis*, 95 U. S. Rep., 407.)

Perhaps an answer to your second inquiry is unnecessary. I however add that, in view of the language of the appropriation act, the Department would be fully justified in recognizing only the firm of Fabbri & Chauncey, assuming always that as a matter of fact those were the parties who actually contracted with the United States, by reissuing approved accounts to them, which need not come through Hurlbut & Son, their brokers. The language of the statute of June 14, 1878, in reference to this account, indicates quite clearly that the only reason for the mention of the name of Hurlbut & Son was for the purpose simply of identifying the claim, or a portion of the claim, which Fabbri & Chauncey had against the United States, and that the appropriation was made for the purpose of paying the claim of Fabbri & Chauncey, and not any alleged claim of Hurlbut & Son.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. R. W. THOMPSON,

Secretary of the Navy.

Payment by Mistake.

PAYMENT BY MISTAKE.

A claim was presented to the Southern Claims Commissioners, under the act of March 3, 1871, chap. 116, the claimant describing himself in his application as "Alexander Anderson, of Augusta County, Virginia." The commissioners made favorable report thereon, finding the amount due claimant to be \$175. Their report was adopted by Congress, and by act of March 3, 1873, chap. 339, the Secretary of the Treasury was authorized to pay \$175, "out of any moneys in the Treasury not otherwise appropriated," to "Alexander Anderson, of Virginia." In the meantime a claim had also been presented to the commissioners in the name of Alexander Anderson, of Amelia County, Virginia, which was not allowed. The latter claimant, in March, 1873, gave F. a power of attorney to receive for him the \$175 allowed by said act to "Alexander Anderson, of Virginia," describing himself as "Alexander Anderson, of Amelia Court-House, of the county of Amelia, in the State of Virginia." The money was paid to F. on filing said power, who had acted in good faith, and was not informed of the mistake until after he turned over the money to his principal.

Held, (1) that F. is under no legal liability for the money; (2) that his principal is liable, either at the suit of the rightful claimant or of the United States; (3) that the officer of the Treasury, through whose negligence the mistake was made, is legally chargeable with the amount, to be passed to his credit on the recovery of the money; (4) the rightful claimant does not, in consequence of the mistake, lose his right to be paid out of any money remaining in the Treasury not otherwise appropriated; (5) a second appropriation warrant may legally issue to again place the amount due the rightful claimant to the credit of the Secretary of War, that he may draw a new requisition on which a new warrant can issue in payment of the claim

DEPARTMENT OF JUSTICE,
October 23, 1878.

SIR: I have carefully considered the questions submitted to me in your letter of October 12, touching the payment by mistake to Alexander Anderson, of Amelia County, Virginia, of \$175, which rightfully belonged to Alexander Anderson, of Augusta County, Virginia.

The papers transmitted to me state or concede the following facts:

Alexander Anderson, of Augusta County, Virginia, filed his claim under the act of March 3, 1871 (16 Stat., 524), appointing commissioners to examine and report to Congress upon claims of loyal citizens for supplies furnished to the Army during the rebellion, describing himself in his applica-

Payment by Mistake.

tion as "Alexander Anderson, of Augusta County, Virginia." The commissioners reported favorably on his claim, among others, stating the amount due him to be \$175. Congress adopted the report of the commissioners, and passed the act of March 3, 1873 (17 Stat., 741-757), authorizing and requiring the Secretary of the Treasury to pay, among other claims, \$175, "out of moneys in the Treasury not otherwise appropriated," to "Alexander Anderson, of Virginia."

Alexander Anderson, of Amelia County, Virginia, had also presented a claim to the commissioners, but it had not been allowed. On the 13th of March, 1873, he executed to H. G. Fant, of Washington City, a power of attorney to receive for him the \$175 allowed by the act to "Alexander Anderson, of Virginia." In the power he described himself as "Alexander Anderson, of Amelia Court-House, of the county of Amelia, in the State of Virginia." On filing this power, Fant received the money for his principal, the account having first passed through all the customary formalities of examination and settlement, including the receipt from the Secretary of War of a "settlement requisition" for the sum of \$5,015.90, being the aggregate of nineteen of the claims as settled by the proper officers, of which the \$175 in question formed a part.

Fant acted with entire good faith in the matter, and was not informed of the mistake until after he had paid the money over to the attorney of his principal, deducting \$7.50 for his commissions.

The Secretary of War declines to issue another requisition in favor of the rightful claimant until officially advised that the \$175 had been restored to the Treasury by a covering in warrant.

My opinion is asked on the following points:

"First. Whether upon the facts as stated Mr. Fant is liable, and, if so, whether on the whole amount collected by him, or only to the extent of his commission?"

I think Mr. Fant is not liable. The law is well settled that when an agent has received money in good faith for his principal, and has paid it over to him before being informed that the principal was not entitled to receive it, the agent cannot be made to refund.

Payment by Mistake.

In respect to the \$7.50 retained by Fant for his commissions, no discussion is necessary, since he offers, by his attorney, in a letter to this Department, dated October 18, a copy of which is transmitted herewith, to repay it to the United States.

"Second. If not liable for the amount collected and paid over to his principal before notice of the error, is payment to the attorney of his principal a sufficient payment to the principal to relieve him of liability?"

I answer this question in the affirmative. There is no difference in law between a payment to a principal and a payment to his lawfully authorized agent. In either case, the party paying has placed the money beyond his control.

"Third. If Mr. Fant is liable for any part of the amount collected, can that amount be legally set off on another account in which the United States are indebted to him, and credited to the appropriation from which the original amount was erroneously paid, or does the law require the proceeding in this case to be under the act of March 3, 1875?"

My answer to the first question, to the effect that Fant is under no legal liability to the United States in respect to the payment, renders an answer to the present question unnecessary.

"Fourth. If Mr. Fant is not liable for the moneys improperly collected by and paid to him, in what way can the Secretary recover those moneys and restore them to the Treasury?"

I answer, first, by a suit against Fant's principal, either on behalf of the United States as plaintiff or of the rightful claimant, to either of whom the recipient is legally liable for money had and received, it having been paid under mistake of fact. Secondly, the officer of the Treasury through whose negligence the mistake was made is legally chargeable with the amount, to be passed to his credit on the recovery of the money by the Treasury.

"Fifth. Have the proceedings above referred to deprived the real claimant, who took no part in these proceedings, of his right to be paid out of any money in the Treasury not otherwise appropriated?"

I answer this question in the negative, it being, of course,

Transportation of Mail by Union Pacific Railroad Company.

understood that thereafter the rightful claimant could in such case maintain no action against the wrongful receiver.

"Sixth. May a second appropriation warrant legally issue to again place the amount due the rightful claimant to the credit of the Secretary of War, that he may draw a new requisition on which a new warrant can issue in payment of the claim?"

There is no legal objection to this. The fund appropriated by the act for the payment of the claim in question was no more exhausted by the loss of the money from its being paid out by mistake than it would have been by the robbery of it from the Treasury vaults or by an embezzlement of it by an employé of the Department. The act, in connection with the commissioners' report to which it refers, and with which it must be read, directs the payment of \$175 to "Alexander Anderson, of Augusta County, Virginia," "out of any moneys not otherwise appropriated," and the act is not complied with until this payment is made. So long, therefore, as there are in the Treasury funds "not otherwise appropriated" they may be lawfully used for the payment of the claim.

Neither do I perceive that any embarrassment would be caused in the accounts of the Secretary of War by the issuance of a second requisition, a second "appropriation warrant" from the Treasury operating as a credit to him for the identical amount.

The papers transmitted are herewith returned.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. JOHN SHERMAN,
Secretary of the Treasury.

TRANSPORTATION OF MAIL BY THE UNION PACIFIC RAILROAD COMPANY.

Advised that the Postmaster-General, in adjusting the rates of compensation to be allowed the Union Pacific Railroad Company for carrying the mails, apply the same rules that Congress has made applicable to railroad companies in general (see acts of March 3, 1873, chap. 231, July 12, 1873, chap. 179, and June 17, 1878, chap. 259), until the Supreme Court

Protests and Appeals in Customs Cases.

shall have made an authoritative settlement of the questions raised by that company—concurring in opinion of February 16, 1877 (15 Opin., 610).

DEPARTMENT OF JUSTICE,
October 31, 1878.

SIR: Replying to your letter of the 29th instant, inquiring whether the Union Pacific Railroad Company is entitled to compensation for carrying the mails between Omaha and Ogden "at fair and reasonable rates of compensation not to exceed the amounts paid by private parties for the same kind of service," to be determined under the provisions of the sixth section of the act of July 1, 1862, or whether it is the duty of the Department to adjust the rates of compensation to be allowed on said road, under the provisions of the acts of March 3, 1873, July 12, 1876, and June 17, 1878, I have the honor to inclose a copy of an opinion rendered by the Solicitor-General, Mr. S. F. Phillips, on February 16, 1877, and approved by my predecessor, the Hon. Alphonso Taft. I concur in the recommendation with which that opinion concludes, that "until the court shall have made an authoritative settlement of the questions raised by the Union Pacific Railroad Company I advise that you apply to your official dealings with this road the same rules that Congress has made applicable to railroad companies in general."

Very respectfully, your obedient servant,
CHAS. DEVENS.

Hon. DAVID M. KEY,
Postmaster-General.

PROTESTS AND APPEALS IN CUSTOMS CASES.

Where protests and appeals have been filed, and recognized as valid when filed, at a different time or in a different manner than that required by section 2931 Rev. Stat., by the mutual error of the customs officers and of the importer, it is not competent to the Treasury Department to recognize such protests and appeals as valid.

It is for the person entering the goods to see that the proper steps are taken to protect his right to prosecute his claim for a refund of duties if he desires such refund, and a mistake made by the customs officers or the Department cannot place him in such position that he can maintain an action without complying with the requirements of the law.

Protests and Appeals in Customs Cases.

Suggestions in regard to the disposition of cases wherein the requirements of the law have been neglected, and in which suits have been commenced, but were afterwards discontinued upon the understanding that the Department would proceed to refund duties found to have been illegally collected.

DEPARTMENT OF JUSTICE,
October 31, 1878.

SIR: Your letter of the 25th instant presents to me certain questions, which are rather questions of administration than of law. At the same time, I very readily give my opinion upon them, as the state of the law undoubtedly affects the administrative duty with which you are charged.

It appears that by a decision of Mr. Chief Justice Waite in the circuit court it has been held that protests and appeals filed under section 2931 of the Revised Statutes are not valid if so filed prior to the ascertainment and liquidation of the duties. It appears to have been the custom of the Department heretofore, and of the officers of the customs, to accept as valid protests and appeals which were filed before the liquidation of the duty and found on file at the date of such liquidation, such mode of procedure having been regarded as a substantial compliance with the law. Large numbers of appeals which were filed in this manner have been decided by the Department, and from such decisions suits have been brought to recover the excess of duties exacted. It further appears that many of these suits embraced questions which have recently been passed upon by the Supreme Court, which has held that the rate of duty exacted by the collector was in excess of that required by law. Accepting the decisions of the Supreme Court as a proper interpretation of the law, the Treasury Department has given instructions in this class of cases to the collectors of customs to prepare the necessary papers for the refund of the excess of duties upon discontinuance of the suits brought to recover the amounts. In compliance with such instructions, suits have been discontinued, and the customs officers have been engaged in making up the necessary statements for the refund of the excessive duties.

This decision of the circuit court has been adopted, and should be adopted, as the rule of action to be followed by the Treasury Department.

Protests and Appeals in Customs Cases.

The inquiry, however, is suggested whether protests and appeals which were filed before the liquidation of the entry, and found on file at the date of such liquidation, may now be recognized as proper protests and appeals, it having been the custom of the Department and of the customs officers to accept them as such.

If protests and appeals have been filed and recognized as valid when filed at a different time, or in a different manner, than that required by law, by the mutual error of the customs officers and of the person entering the goods, it is not competent for the Department to recognize such protests and appeals as valid. To hold that the Department or its subordinate officers have this power would be to assume that they may dispense, by an agreement, with a requisition of law which is obligatory upon both. It is for the person entering the goods to see that he takes the proper steps to protect his right to prosecute his claim for a refund of duties, if he desires such refund, and a mistake made by the Treasury Department or the collectors of customs cannot relieve him of that obligation, or place him in such position that he can maintain an action without complying with the requirements of law. This decision must therefore be held as applying not only to entries hereafter to be made, but to those past, where the requisitions of law have been neglected; and the law will form an obstacle in such case to the recovery by the claimant of the duties imposed, and against which he has failed to protest in legal manner.

It is a more difficult inquiry what shall be done in reference to the cases which have been commenced and been discontinued upon the understanding that the Department would proceed to refund duties which have been found to have been illegally collected.

These cases will be found to be divided into the following classes:

The cases which have been brought up by writ of error from the district court to the circuit court and to the Supreme Court, in which this question in regard to protests was not raised, would necessarily have been decided irrespective of it, and if the duty in such case was wrongfully assessed, there

Claims under the Treaty of 1819 with Spain.

is no reason why it should not now be refunded, as it would have been too late to object to the insufficiency of the protest.

There are, however, undoubtedly cases which have been discontinued in which this question might have been raised. With regard to those cases, they should be restored to the docket and the parties placed in the same situation in which they would have been had no agreement for the discontinuance of their cases been made. It is believed that in all cases courts restore to the docket at once, by the agreement of the parties, cases which have been discontinued, and instructions should therefore be given to the district-attorney that he should consent that the cases be thus restored, and when again upon the docket the plaintiffs will be in the same situation that they were before the agreement.

If it shall be found that there is a third class of cases, in which it is impossible to place the parties in the same condition in which they stood before the agreement for discontinuance, it may be proper therein to proceed to refund the duties. In such cases the party will have changed his position, and sustained injury by the action of the Secretary, and the Secretary may therefore treat the act done by him as final in its character, and wanting only in matters of detail to make it entirely complete.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. JOHN SHERMAN,
Secretary of the Treasury.

CLAIMS UNDER THE TREATY OF 1819 WITH SPAIN.

The Secretary of the Treasury, by the acts of March 3, 1823, chap. 35, and June 26, 1834, chap. 87, was invested with authority to revise the decisions of the judges when made *in favor* of claimants under the ninth article of the treaty with Spain of February 22, 1819, and from his action thereon the law provided no appeal. The President cannot interpose to change the result of the action of the Secretary.

DEPARTMENT OF JUSTICE,
November 8, 1878.

SIR: I have had under consideration the memorial of Charles E. Sherman addressed to the President on behalf of

Claims under the Treaty of 1819 with Spain.

certain claimants under the ninth article of the treaty of 1819, between the United States and Spain. This article is as follows :

“The United States will cause satisfaction to be made for the injuries, if any, which by process of law shall be established to have been suffered by the Spanish officers, and individual Spanish inhabitants, by the late operations of the American Army in Florida.” (8 Stat., 260.)

The interposition of Congress was necessary to carry into effect this provision of the treaty. Accordingly, acts entitled as follows have been passed :

March 3, 1823.—An act to carry into effect the ninth article of the treaty concluded between the United States and Spain the 22d day of February, 1819. (3 Stat., 768.)

June 26, 1834.—An act for the relief of certain inhabitants of East Florida. (6 Stat., 569.)

Section 6 of the act of February 22, 1847, entitled “An act to regulate the exercise of the appellate jurisdiction of the Supreme Court of the United States in certain cases, and for other purposes.” (9 Stat., 130.)

Also, an act, March 3, 1849, for the relief of certain persons, among whom were Francis Ferreira, administrator of Francis Pass.

I deem it necessary to quote particularly two or three only of the provisions of these statutes.

First. The judges of the Territorial courts of Florida, the judge of the superior court of Saint Augustine while Florida was a Territory, and the judge of the United States district court after Florida became a State, were designated as the tribunals by which claims under the treaty were to be “adjusted,” “adjudged,” or “adjudicated”; for all these words are used.

Second. In those cases only in which the judges decided *in favor of the claimants*, the decisions with the evidence on which they were founded were to be reported by the said judges to the *Secretary of the Treasury*.

Third. The Secretary of the Treasury, on being satisfied that said decisions were “just and equitable within the provisions of the treaty” (as in the act of 1823), in all cases where the “decisions shall be deemed by him to be just” (as in the

Claims under the Treaty of 1819 with Spain.

act of 1834), was required to pay the *amounts* awarded by said decisions.

The judges added in each case to the value (as found by them) of the property at the time of its destruction, and to the amount of the damage at the time it was done, 5 per cent., not as interest "*eo nomine*," but as compensation for delay of payment, or as damages for the loss of the use of the property from the date of the injury to the date of the judgment.

Secretaries of the Treasury, Judge Woodbury first, and others following him, construing these laws as giving them authority to revise, modify, or to set aside the decisions of the judges, have in all cases rejected the item of damages for the loss of the use of the property or compensation for delay of payment.

Of this action the petitioners complain, alleging, first, that upon a proper construction of the treaty and the statutes above cited the Secretary had no power to revise or modify the decisions of the judges; and second, if they had such power, their ruling in respect to interest was wrong.

But the Secretary of the Treasury is the officer upon whom these statutes have devolved the duty and responsibility of paying the amounts due to the claimants, and he must be satisfied, before paying such amounts, that the decisions awarding them were "just and equitable within the provisions of the treaty," or, as in the statute of 1834, that the decisions were "just."

There is no doubt that the Secretary must be guided by the laws enacted by Congress. From them only he received his power to act.

Having sought advice from gentlemen distinguished for their learning and ability, occupying the office of Attorney-General at the times (see opinions of Mr. Crittenden, 3 Opin., 635; of Mr. Legare, 3 Opin., 677; of Mr. Nelson, 4 Opin., 286), Secretaries of the Treasury have acted. Beginning with Judge Woodbury, they have decided that they had power under the laws quoted above to review the decisions of the judges, and upon such review they have disallowed interest.

Thus it will be seen that the officer designated by the law has, according to his understanding of it, done the work

Case of Brownell Granger.

assigned to him. The law provides no appeal from his decision. In my opinion the President cannot interpose to change the result of his action.

Very respectfully, your obedient servant,

CHAS. DEVENS.

The PRESIDENT.

CASE OF BROWNELL GRANGER.

In December, 1876, the President nominated W. to be a civil engineer in the Navy *vice* G., removed, and the nomination was confirmed by the Senate January 9, 1877, on which date he was also commissioned by the President. No notice was sent to G. of his removal or of the appointment of W. in his place.

From the terms of the act of March 2, 1867, chap. 172 (section 1413 Rev. Stat.), providing for the appointment of civil engineers, it is to be implied that the service of such officer may be dispensed with when necessary. The appointment is local in its character.

Although, under section 9 of the act of March 3, 1871, chap. 117 (section 1478 Rev. Stat.), the President was given a discretionary power to confer relative rank upon civil engineers, this power has never been exercised; and they have no rank by which their relation to the officers or men in the Navy can be determined.

Held, accordingly, (1) that civil engineers (in the absence of any action by the President conferring upon them relative rank) are not to be considered naval officers, but civil officers; (2) that it was competent to the President, if he deemed the further continuance of G. in the service not advisable, to nominate W. in his place; (3) the confirmation and appointment of W. operated to remove G., and the fact that the latter received no notice of his dismissal is unimportant. Opinions of August 19, 1876, and September 5, 1876 (15 Opin., 165, 597), referred to and commented on.

DEPARTMENT OF JUSTICE,

November 18, 1878.

SIR: Your letter of the 5th instant inquires as to the status of Brownell Granger, recently a civil engineer at the Charlestown Navy Yard, with the view of determining whether Mr. Granger must be still treated as such.

All the facts necessary to be considered in regard to the case seem to be these: On December 12, 1876, Mr. U. S. G. White was nominated to the Senate to be a civil engineer in the Navy *vice* Brownell Granger, removed. January 9, 1877, he was confirmed "to be a civil engineer in the Navy, *vice*

Case of Brownell Granger.

Granger, removed," and a commission was issued to him by the President the same day. No notice was sent to Mr. Granger of his removal or of the appointment of Mr. White to succeed him.

An answer to your inquiry necessarily involves an answer to the question whether Mr. Granger was a naval officer in the service of the United States or a civilian officer connected with such service.

It seems to have been a comparatively early practice after the navy-yards of the United States were established to estimate for officers of this class among the civilian employes at such yards, who were usually included in the appropriation for pay of superintendents and the civil establishment at the navy-yards, &c.

The provision in regard to the appointment of the class of officers under consideration is found in the act of March 2, 1867 (embodied in section 1413 of the Revised Statutes), in the following words: "The President, by and with the advice and consent of the Senate, may appoint a civil engineer and a naval storekeeper at each of the navy-yards where such officers may be necessary."

This statute necessarily implies that such appointments are only to be made where such officers are found necessary, and, inferentially, that their services may be dispensed with when unnecessary; and indicates that the appointment is to some extent a local one, and that the appointee cannot be a naval officer in the full sense of the term.

By section 1478 of the Revised Statutes (which is a re-enactment of the statute of March 3, 1871), "civil engineers shall have such relative rank as the President may fix." An examination of the original statute shows that the authority was given to the President "in his discretion." This discretion has never been exercised, and no relative rank has been assigned to these officers. It is difficult to conceive that those can be considered as officers in the Navy who have no rank by which their relation to the other officers, or to the men, can be determined.

In the absence of such act by the President, I am of opinion that the civil engineers are civil officers, and that it was competent for the President, if he deemed further continuance

Land of the United States at Sandy Hook.

of Mr. Granger in the service not advisable, to nominate a successor to the Senate in his place, and that the confirmation of such nominee would operate to remove Mr. Granger from the position of civil engineer.

It is not important in this view whether or not notice was actually sent to Mr. Granger of his dismissal.

Your letter calls my attention to two opinions of this Department, dated respectively August 19 and September 5, 1876, in relation to civil engineers in the Navy. The last of these opinions, you will observe, is merely explanatory of the earlier one, and by an examination of the earlier one it will be seen that in the first sentence the Attorney-General waives the question whether these civil engineers are officers in the Navy, and disposes of the subject then before him without reference to that inquiry. I do not, therefore, find it necessary in this opinion to express my views as to the other matters contained in the opinions referred to.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. R. W. THOMPSON,
Secretary of the Navy.

LAND OF THE UNITED STATES AT SANDY HOOK.

Title of the United States to certain land held thereby at Sandy Hook reviewed; said land embracing the entire tract bounded southwardly by a line running east from the mouth of Young's Creek at low-water to the sea, and on every other side by the sea.

The permission given by the President to the Long Branch and Sea-Shore Railroad Company in 1864, and that given to the same company with the approval of the Secretary of War in 1869, to occupy and use certain parts of said land for railroad purposes, conferred upon the company no interest whatever in the land itself. They constitute nothing more than a license, which is revokable at any time by the President or the duly authorized agents of the War Department; and upon the revocation thereof all the privileges derived thereunder by the company would terminate.

So, by the terms of the agreement made March 31, 1854, with the New York and Sandy Hook Telegraph Company, it may be put an end to at any time at the pleasure of the Government, whereupon all rights and privileges derived by that company thereunder would immediately cease.

Land of the United States at Sandy Hook.

There are no existing legal rights to said land in conflict or incompatible with the exclusive right and title of the United States.

DEPARTMENT OF JUSTICE,
November 22, 1878.

SIR : I have the honor to return herewith the papers which accompanied your letter of the 3d of April, 1877, in relation to the land held by the United States at Sandy Hook.

The question presented by these papers is, "as to whether there are any existing legal rights to land on Sandy Hook in conflict or incompatible with the exclusive right and title of the United States."

The land in question includes the entire tract on Sandy Hook, bounded southwardly by a line running east from the mouth of Young's Creek, at low-water, to the sea, and on every other side by the sea. The history of the title of the United States to this tract is as follows :

1. By the recitals contained in the deed of Richard Hartshorne and wife to the United States, dated June 17, 1817, hereinafter mentioned, it appears that the said tract was granted to one other Richard Hartshorne and his heirs by the proprietors of East Jersey by letters patent dated November 2, 1692; that by deed dated May 10, 1706, Richard Hartshorne, the patentee, conveyed the same tract to his son William in fee; that William Hartshorne died seized of the premises, leaving a will by which his executors were authorized to sell all his real estate; that on the 18th of April, 1749, said executors sold and conveyed the premises to John Hartshorne, who by deed dated July 10, 1749, conveyed the premises to Hugh, Robert, and Esek Hartshorne in fee, as tenants in common; and that by deed dated January 17, 1754, Hugh Hartshorne conveyed all his interest in the premises to the said Robert and Esek Hartshorne.

2. Robert and Esek Hartshorne, by deed dated May 10, 1762, in consideration, "of the sum of seven hundred and fifty pounds lawful money of the colony of New York," conveyed a part of the premises, containing four acres, to John Cruger, Philip Livingston, Leonard Lispenard, and William Bayard. It appears by the preamble to an act passed by the legislature of the State of New York, February 3, 1790 (a

Land of the United States at Sandy Hook.

copy of which I send with the papers, marked M), that the grantees in this deed had purchased the four acres thereby conveyed as trustees for the then colony of New York, and as such trustees afterwards erected thereon a light-house and other buildings for public uses. The preamble furthermore sets forth that the said Livingston is dead, and the estate of the said Bayard is forfeited, and "the title at law of and in the said land and premises is thereby become vested in the said John Cruger and Leonard Lispenard as trustees as aforesaid"; that the United States in Congress assembled have provided for erecting and supporting light-houses; and that in order to further the intention of the United States the enactment is made. The act then declares, "That all the estate, right, and title of the people of the State of New York, both in law and equity, of, in, and to the said piece of land, and the light-house and buildings erected thereon, and all the lands belonging to the same, shall be and hereby is granted to and vested in the United States of America; and that the said John Cruger and Leonard Lispenard hereby are directed and required to grant, release, and convey all their estate, right, title, and interest of and in the said land, light-house, and buildings thereon, to the United States of America." It is not known whether the said Cruger and Lispenard executed a conveyance to the United States in conformity to the requirement of this act. But by force of the act itself the United States succeeded to the equitable title and entire beneficial interest to and in the premises; and, moreover, the United States have been in continued possession of the premises ever since, using the same for light-house purposes. On the 16th of November, 1790, the legislature of the State of New Jersey passed an act ceding to the United States the jurisdiction of that State over the said four acres.

3. It further appears by the recitals in the aforesaid deed of Richard Hartshorne to the United States of June 17, 1817, that by a deed dated December 31, 1799, Robert Hartshorne conveyed to Richard Hartshorne, last above mentioned, all his undivided moiety of the said tract on Sandy Hook, exclusive of the four acres previously conveyed as aforesaid by himself and Esek Hartshorne; that Esek Hartshorne died seized of the remaining undivided moiety of the same tract.

Land of the United States at Sandy Hook.

leaving a will whereby his executors were authorized to sell his real estate; and that the executors, pursuant to the authority given by the will, sold and conveyed the last-mentioned undivided moiety to Tyhee Williams and Nimrod Woodward. Thus the title to the whole tract (exclusive of the four acres) became now vested in Richard Hartshorne, Tyhee Williams, and Nimrod Woodward.

4. By deed dated February 26, 1806, Richard Hartshorne, Tyhee Williams, and Nimrod Woodward, and their wives, in consideration of the sum of \$3,750, conveyed to the United States a part of said tract described as follows, that is to say, "all that part of the point of land in the said county of Monmouth lying on the north side of a line drawn east and west through the present light-house on Sandy Hook."

5. On the 25th of May, 1807, by a deed of that date, Tyhee Williams and Nimrod Woodward, and their wives, conveyed to Richard Hartshorne all their undivided moiety of the said tract on Sandy Hook, exclusive of the four acres deeded as aforesaid in 1762, and of the other part of the same tract deeded as aforesaid in 1806. By this conveyance Richard Hartshorne became sole owner of the tract, excepting the two parcels thereof previously deeded, to which reference has just been made.

6. Richard Hartshorne and wife, by deed dated June 17, 1817, in consideration of the sum of \$20,000, conveyed to the United States the entire tract on Sandy Hook, "bounded southwardly by a line running east from the mouth of Young's Creek at low water to the sea," excepting the parts of the same tract conveyed by the above-mentioned deeds of May 10, 1762, and February 26, 1806.

It is understood that the part of the Sandy Hook tract which was conveyed to the United States by the deed of June 17, 1817, and also that part of the same tract which was conveyed to the United States by the deed of February 26, 1806, were purchased for military purposes, and have each been in the possession of the Government from the date of those conveyances respectively. By an act of the New Jersey legislature, dated March 12, 1846, the jurisdiction of the State over "all that portion of Sandy Hook * * * owned by the United States, lying north of an east and west line through

Land of the United States at Sandy Hook.

the mouth of Young's Creek at low water, and extending across the island or Cape Sandy Hook from shore to shore, and bounded on all the other sides by the sea and Sandy Hook Bay," is ceded to the United States "so long as the tract shall be applied to the military or public purposes of said United States, and no longer."

The foregoing exhibits a good and valid documentary title in the United States to the whole of the land on Sandy Hook lying northwardly of a line running east from the mouth of Young's Creek at low water to the sea, as sole and exclusive proprietor of the same; and the ownership of the Government is, besides, fortified by long possession. It must be deemed, therefore, that there exists no legal right to this land, or to any part thereof, "in conflict or incompatible with the exclusive right and title of the United States," unless such legal right has been derived from the United States since the acquisition of the premises by the Government.

In 1851, it was contemplated to sell and transfer a part of this land to the State of New York. President Fillmore, on the 29th of January of that year, addressed a letter to the Attorney-General stating that "the State of New York desires to purchase from the United States a piece of land at Sandy Hook, in the State of New Jersey, for a marine hospital." With that letter papers relating to the title were inclosed, and the Attorney-General was requested to examine the subject and report to the President upon certain points submitted. The records of this Department afford no information that any further steps were taken toward effecting a sale and transfer to the State of New York, and it is believed that the negotiation for the purchase ended without anything more being done. At that period the only authority under which the land at Sandy Hook (*i. e.*, such part as was originally required for military uses) could be alienated was that given by the act of March 2, 1819 (3 Stat., 520), which authorized the Secretary of War, under the direction of the President, to cause to be sold such military sites as may have been found or become useless for military purposes. Had a sale actually taken place, it is to be presumed that the records of your Department would disclose the fact. In the absence of any documentary or record evidence of a transfer (and I am

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not aware of the existence of any such evidence), we may safely assume that none took place.

Among the papers received with your letter is a copy of an agreement purporting to have been made on the 31st of March, 1851 (but was probably made March 31, 1854), between Maj. W. D. Fraser, of the Corps of Engineers, as agent of the United States, and the New York and Sandy Hook Telegraph Company. By this agreement there was "let and rented" to the said company the place near the point of Sandy Hook then occupied thereby, and the appurtenances, "together with so much land around the same, not to exceed one hundred feet square in all, as may be necessary for their use as a telegraph station, and also the privilege of erecting poles and putting up one or more wires or conductors on Sandy Hook aforesaid for the purpose of connecting the said telegraph station with other telegraph stations in New Jersey and elsewhere, for the term of one year, commencing on the 1st of January, 1854, at an annual rent of \$5, payable semi-annually on the 30th of June and 31st of December," &c. The agreement provides that the company "shall have the refusal of the same premises for the same use, and at the same rent, and upon the same terms and conditions, from year to year thereafter, so long as it may be considered expedient and for the public interests by the said Bvt. Maj. Wm. D. Fraser, or his successors." It also imposes certain restrictions respecting the use of the premises, and provides that the company "shall be at all times bound by such other restrictions as said Bvt. Maj. W. D. Fraser, or his successors, may deem it necessary to impose for the protection of the public interest." It furthermore contains a provision that the lease shall continue in force during the pleasure of the United States, and no longer, and that "the said Bvt. Maj. W. D. Fraser, or his successors, may at any time subsequent to the 1st of January, 1854, aforesaid, terminate and put an end to the same, by serving a written notice upon the president, secretary, or superintendent of the said company," declaring that the lease is at an end. This agreement was approved by the Chief of Engineers, "with the understanding that by Brevet Major Fraser, or his successors, is meant any duly authorized agent of the

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War Department," and this understanding was assented to on the part of the company.

Assuming that the officer who represented the United States in this matter had sufficient authority to make the agreement, and that such agreement is valid and still subsists, yet it confers no rights which can be regarded as "incompatible with the title of the United States." By its terms it may at any time be put an end to at the will and pleasure of the Government, whereupon all rights and privileges derived thereunder would immediately cease.

The sixth section of the act of June 12, 1858 (11 Stat., 336), repealed all laws authorizing the sale of "military sites which are or may become useless for military purposes," and provided that "said lands shall not be subject to sale or pre-emption under any of the laws of the United States." The effect of this legislation was to take away from the Executive Department of the Government all such authority as it was previously invested with to dispose of lands owned by the United States at Sandy Hook, and Congress does not appear to have since given that Department any new powers by which it would be authorized to convey those lands, or any right or interest therein.

On the 21st of July, 1864, President Lincoln gave to the Long Branch and Sea-Shore Railroad Company permission to make and use a railroad track on the land of the United States at Sandy Hook. The permission thus given is in the following terms:

"The Long Branch and Sea-Shore Railroad Company is hereby authorized to make and use a railroad track on the land of the United States, conforming to the curved dotted line on this map, which line commences at the figure 8 and runs southward, nearly touching the right-hand ends of these written lines, and on till it passes off the Government land, upon the condition that said railroad track and all possession of the ground shall be removed and surrendered, by force if necessary, upon either the order of the President of the United States or a joint resolution of Congress so requiring."

Again, permission to use part of the Government land at Sandy Hook for railroad purposes was granted to the same company in August, 1869, as appears by an agreement

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between Bvt. Maj. Gen. John Newton, of the Corps of Engineers, acting in behalf of the United States, and the said company. By this agreement, which is dated August 19, 1869, permission is given to the company "to make, extend, and use a railroad track on the land of the United States," conforming generally to certain lines drawn upon a certain map; the company to have the use of the land for these purposes from year to year thereafter "so long as it may be considered expedient and for the public interest by the Secretary of War, or other proper officer of the Government, in charge of the United States lands at Sandy Hook." In the agreement is also found this provision: "And it is hereby further specially understood and agreed that this permission and the privileges granted hereby shall continue in force only during the pleasure of the party of the first part (*i. e.*, of the United States) and no longer, and that the said Bvt. Maj. Gen. John Newton, or any duly authorized agent of the War Department, may at any time subsequent to the signing of this agreement terminate and put an end to the same by serving a written notice upon the president, secretary, or superintendent of the company, the party hereto of the second part, declaring that this agreement is at an end." This agreement was approved by the Secretary of War, August 27, 1869. (See Ex. Doc. No. 166, House Rep., second session Forty-first Congress.)

The permission given to the said railroad company by the President in 1864, and that given to the same company with the approval of the Secretary of War in 1869, to occupy and use certain parts of the land of the United States at Sandy Hook for railroad purposes, conferred upon the company no interest whatever in the land itself. They constitute, at most, nothing more than a license to enter upon the premises and do that which, if done without such permission, would be a trespass on the part of the agents and employes of the company thus acting. This license, by the very terms in which it is given, may be revoked at any time by the Executive or the duly authorized agents of the War Department, and upon its revocation all the privileges derived thereunder by the railroad company would necessarily come to an end.

The papers submitted by you contain no information of

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any private parties occupying the land at Sandy Hook besides the telegraphic company and the railroad company above named; nor do they suggest that any others than those companies, or the State of New York, may have any legal rights to the land. My views as to the existence of such rights in the State or either of the companies being already stated, the subject does not appear to call for any further examination from me.

To the inquiry presented I accordingly reply that in my opinion there are no "existing legal rights to land on Sandy Hook in conflict or incompatible with the exclusive right and title of the United States."

In addition to the papers mentioned, I transmit herewith a letter from the Chief of Engineers to the Secretary of War, dated January 29, 1851, together with the deeds of conveyance and other papers described therein. These last papers were found among the files of this Department.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. GEORGE W. McCRARY,
Secretary of War.

STEAMER B. P. CHENEY.

The appropriation of \$75,663.50 to pay for horses, steamboats, and other property lost in the military service, made by the act of June 14, 1878, chap. 191, was not intended to apply to the steamer B. P. Cheney. The provision in the act of June 20, 1878, chap. 359, declaring that said appropriation should not be construed to authorize the payment of the claim for that steamer without further legislation is explanatory of the former enactment.

The amount of the appropriation is subject to the requisition of the Secretary of War, to be applied to those objects which the appropriation describes, with that exception.

DEPARTMENT OF JUSTICE,

November 23, 1878.

SIR: Yours of the 13th of August last calls my attention to the deficiency act of June 14, 1878, and to the sundry civil act of June 20, 1878, touching an appropriation of \$75,666.50 to pay for horses, steamboats, and other property lost in the service, and inquires whether any portion of said amount should be considered as a specific appropriation on account

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of the steamer B. P. Cheney, or as not subject to your requisition without further legislation.

The laws of the United States contemplate that appropriations for the use of any Department shall be made upon the basis of estimates therefor submitted by its head through the Secretary of the Treasury. (Sections 3660, 3665, and 3669 of the Revised Statutes.) It is competent, however, for Congress to make appropriations for objects not included in said estimates, as well as to reject those thus included.

In this case, estimates for property lost in the military service (act of March 3, 1849), amounting to \$75,420.28, were duly presented by the Secretary of War. One item therein was for the loss of the steamer Cheney, \$28,370.72. While these estimates were being considered by the Committee of Appropriations of the House, the Secretary of the Treasury communicated to it information tending to impeach the item above specified, and presenting other items for loss of horses, &c., amounting to \$28,615.91; items that had been approved by the proper auditor, but had never been presented to, and so had never been estimated for, by the Secretary of War. Congress thereupon made an appropriation, June 14, 1878, including therein under an item specified as "to pay for horses, mules, oxen, wagons, carts, sleighs, harness, steamboats, and other vessels," &c., \$75,666.50; that is, \$295.78 more than it would have amounted to if the items and prices had remained as under the estimates of the Secretary of War, and only seven cents less than if Congress had thrown out the steamboat item and substituted therefor that "for horses," &c., transmitted as above by the Secretary of the Treasury. Six days afterward Congress adopted an amendment to the sundry civil bill declaring "that the appropriation of \$75,666.50 to pay for horses, mules, oxen, wagons, carts, sleighs, harness, steamboats and other vessels, railroad engines and railroad cars, killed, lost, captured, destroyed, or abandoned while in the military service, contained in the act 'making appropriations to supply deficiencies in the appropriations for the fiscal year ending June, 30, 1878, and prior years, and for those heretofore treated as permanent, for reappropriations, and for other purposes,' be not construed to authorize the payment of the claim for the steamer B. P. Cheney without further legislation."

It is fairly to be inferred that the item for horses, &c., &c.,

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included in the second estimate of the Secretary of the Treasury was substituted for the estimate for the steamboat Cheney, and for these reasons: the report of the Secretary had adduced evidence tending to impeach the claim for said steamboat, and the variance between the amount which he had estimated for, excluding that steamboat, but including the second estimate, was only seven cents. If the Cheney were included in the item the variance would be more than \$200 from the correct sum. The amendment passed subsequently seems to be nothing more than a precaution to guard against a construction which would allow the Cheney to be paid for, and it admits nothing more than that the act might possibly bear such construction. It explains rather than alters the act, and indicates the intention of Congress by the act to provide for the horses, &c., included in the second estimate. The estimates are intended for the information of Congress, and the statement of the Secretary of the Treasury as to the horses, &c., accounts for which had been audited in his Department, accompanied as it was by evidence impeaching the claim for the Cheney, was evidence upon which Congress might well have acted. It was an audit of the Treasury, and the formal recognition of it by the Secretary of War would hardly have added value to it in the way of information. It might well have been deemed by Congress that by the original act the Secretary of the Treasury would feel himself fully authorized to pay for anything which corresponded with the class of claims that were therein provided for, and the explanation afforded by the amendment indicates that the appropriation which would not have been large enough for both the horses, &c., &c., and the steamboat, was not intended to apply to the steamboat.

In direct answer to your inquiry, therefore, I am of opinion that the appropriation cannot be used for the steamer Cheney, that having been expressly excluded by the subsequent amendment; and that the sum with that exception is subject to your requisition without further legislation, to be applied to those objects which the appropriation describes.

Very respectfully, your obedient servant,

CHAS. DEVENS.

HON. GEORGE W. MCCRARY,
Secretary of War.

Claim of William P. Wood.

CLAIM OF WILLIAM P. WOOD.

Upon examination of the papers in the claim of William P. Wood, formerly chief of the Secret Service Division of the Treasury Department, for services in capturing certain counterfeit plates for printing 7.30 Treasury notes, &c., under an alleged agreement with the Secretary of the Treasury in 1867: *Advised*, that the approval of the report of Assistant Secretary French, made by the Secretary of the Treasury September 23, 1878, stand as the final determination of the case.

DEPARTMENT OF JUSTICE,
December 2, 1878.

SIR: The claim of William P. Wood, formerly chief of the Secret Service Division of the Treasury Department, which claim, together with the original papers in the case, was referred to me by your letter of the 29th October, 1878, has been fully examined. All the papers have been carefully read; especially the claimant's statements, verbose and irrelevant as many of them are, have been thoroughly considered.

Mr. Wood bases his demand upon what he terms a contract with the Secretary of the Treasury in 1867. In that year a spurious issue of United States securities, known as 7.30 Treasury notes, appeared upon the market, and the counterfeit was so well executed that the Treasury officials were deceived, and redeemed a number of them, the amount of their face value being upwards of \$80,000. These notes were presented for redemption by certain bankers of New York. It was of the greatest importance to the Government, first, to obtain possession of the plates upon which the false notes were printed; second, to convict the parties guilty of executing and uttering the counterfeits; and, third, to recover from the banks and bankers the amounts received by them from the Government in redemption of these spurious notes.

The claimant, in one of his most elaborate statements, alleges that the Secretary promised him a certain sum as a reward upon his accomplishing the first of these objects, the capture of the false plates; another certain sum when it was judicially established, by proof furnished by him, that the notes were counterfeit, and that they were printed upon the false plates to be recovered; and still another sum if he should bring about the arrest of the guilty parties.

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The claimant declares that he has fulfilled these conditions except the last; that by his own efforts he secured the false plates; that by evidence which he brought to the knowledge of the United States attorney in New York it was proved that the notes were spurious, that they were printed upon the captured plates, and upon this proof the Government recovered back the value which the bankers had received from the Treasury upon the counterfeit notes presented by them for redemption.

The evidence produced by the claimant to support these allegations consists chiefly of his own statements, to one of which he makes affidavit. As corroborating evidence, he produces a letter of his own of the 16th of February, 1877, addressed to the Hon. Hugh McCulloch, upon which there is an indorsement by Mr. McCulloch, dated at New York February 26, 1877. There is also a portion of a letter dated October 25, 1877, presumed to be written by Mr. McCulloch, but the second half of the sheet has been torn off, and is not among the papers. It does not appear from the part of the document which remains to whom the letter was addressed, or by whom it was signed. I am willing, however, to take the statements in it as coming from Mr. McCulloch.

After a very careful perusal of these papers, I cannot see that they support the claimant's allegations concerning the contract. In his letter of the 16th of February, among many recitals not pertinent to the question, the claimant says that Mr. McCulloch is aware "that an offer of reward was authorized by yourself (Mr. McCulloch) for the capture of the plates and proof of spurious issue." Upon the back of the letter Mr. McCulloch remarks generally that the foregoing statements are true *according to the best of his recollection*. He goes on to say that Wood rendered very valuable services, &c., and he does not doubt that he, Wood, is justly entitled to *any reward that was offered* for the capture of the counterfeit plates and the proof of the spurious issue.

Mr. McCulloch does not state here that any reward was actually offered, or to whom any reward was offered, but speaks hypothetically. The substance of it is, if any reward was offered Mr. Wood was entitled to it.

In his letter of the 25th of October, 1877, he is more explicit.

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He says that he recollects "that he offered a large reward (some \$20,000) for the capture of the counterfeit plates and the arrest of the counterfeiters." He says further that this offer was made to certain detectives in Philadelphia. He does not say that the offer was made to Wood, but that when the Philadelphia men failed "Colonel Wood was requested to take hold of it and to give it his best services." He "thought it a matter of great importance."

These are the last words upon the half sheet that is extant of the mutilated letter. But in a memorandum of it, found among the papers, there are the following words in quotation marks and underscored, thus: "That no particular sum is named," &c. If these words were in the letter, they tend to show that the Secretary intrusted the matter to Wood in his official capacity of chief of the Secret Service Division, and made to him no special offer of reward. However this may be, it is clear from the part of the letter that remains that the arrest of the counterfeiters was a part of the service for which the reward was offered, and that Mr. Wood was not included among those to whom the offer was made.

How different all this is from the account given by the claimant. First, it was a simple promise of reward for certain services successfully performed. The parties to whom it was made were not bound to do anything, and no damages could have been recovered from them if they failed to act at all. Second, the promise was not made to Wood, probably for the reason that the services to be rendered were within the scope of his official duty. Third, the reward was one sum for two services, one of which Wood does not claim that he performed, to wit, the arrest of the counterfeiters.

But, further, Mr. Wood himself, in his first application for a reward, did not claim under any contract or promise made to him.

The application referred to was made in a letter dated July 1, 1868, addressed to the Solicitor of the Treasury. On page 1 of this paper Mr. Wood says that the Secretary of the Treasury promised a reward (he believes \$15,000) to any one who should capture the 730 spurious plates. He then adds that he did not *expect to be a competitor* for such reward, but was assured by the Secretary that if successful he should be lib-

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erally rewarded. On the last page he pleads for *some reward* for his special exertions and states his *belief* "that he is fully warranted in soliciting such reward as the inducement held out and the surrounding circumstances justified."

Certainly here is no contract set forth, nor any specific promise made by the Secretary to Wood.

Again, the evidence which Wood alleges he brought to the knowledge of the United States attorney for use in the trial of the cases against the bankers was by no means sufficient to prove that the notes were spurious or counterfeit, or that they were printed on the captured plates. Besides, this evidence (and it is the only piece of testimony that he claims to have furnished) tended to show the admission of the defendants in one case only and could be used in that case alone. The other bankers sued certainly would not have permitted the case against Jay Cooke & Co. to be the test case, by the result of which theirs should be governed, if that case turned upon evidence applicable to it alone.

Clearly, then, Wood did not furnish the proof establishing that the notes were spurious or counterfeit.

I find, then, upon the merits of the case, first, that there was no contract between the Secretary and Wood; and, second, that no such promise was made to Wood as he alleges; and, third, that he accomplished one only of the results for which he says the reward was promised.

It is not questioned that he found the false plates, took possession of them, and delivered them to the Government. For this he was rewarded by Mr. McCulloch in the sum of \$5,000, which, beyond a doubt, was in the Secretary's judgment a liberal reward for the service rendered.

At this time, all the facts and circumstances were fresh in the Secretary's mind, and much greater dependence must be placed upon what was done at this time than upon the recollection of the Secretary ten years afterwards, when his memory of the facts is dim and very indefinite, as he himself states in his letter of October 25, 1877.

But the claimant alleges that by his efforts and influence a clause was inserted in the deficiency appropriation act of July 25, 1868 (15 Stat., 173), the object of which was to meet his particular case, to provide a fund from which a reward could

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be paid for his services in this behalf. But the services he describes are not within the terms of the provision. He does not claim that he has been instrumental "in detecting and bringing to trial and punishment persons engaged in counterfeiting these 7.30 Treasury notes." It is manifest that no reward could be given to him out of this fund.

I come now to consider the question of a rehearing upon newly discovered evidence.

From the nature of the case as presented, I do not think its aspect can be changed by additional evidence, whether newly discovered or otherwise. Mr. Wood, in the many papers he has prepared since January 1, 1877, declares time and again that the ground of his claim is a special contract, and he says in one place that it was a secret contract between the Secretary of the Treasury and himself.

Now he has brought forward the only two witnesses who can speak to this alleged contract, viz, Mr. McCulloch, then Secretary of the Treasury, and himself. It has been shown above that in his first letter, written in 1868, Mr. Wood does not say that any contract was made with him, or any specific promise was held out to him, but he *believes* that some reward should be given to him for his special exertions, his activity, untiring energy, &c. Mr. McCulloch sustains this view, but gives no intimation of a contract, or any specific promise. Again, everything that Mr. Wood claims, in respect of proof furnished by him to show before the court in New York that the issues were spurious, is admitted. Now, what new evidence can alter this state of the case, unless indeed Mr. McCulloch will come forward and contradict the statements he has already made?

But, further, the utmost indulgence that can be reasonably asked has already been extended to this claimant to present new evidence. This may be well inferred from a letter of July 22, 1878, addressed by him to the Secretary of the Treasury, in which he says: "Since you have been Secretary of the Treasury I have submitted new evidence from time to time," &c. Unless a claimant must be permitted to introduce evidence afresh as often as there is a decision against him, the case ought not on this ground to be heard anew, for upon

Improvement of South Pass of the Mississippi.

every adverse decision new evidence will spring up on every side.

It will be seen from what is written above that I am unable to concur in the opinion of the Solicitor of the Treasury that a new hearing should be granted to the claimant.

Having treated the case upon its merits, a discussion of other questions which are merely indicated but not expressly propounded in your letter of the 29th of October, 1878, would seem to be necessary.

I have the honor to recommend that your approval bearing date September 23, 1878, of the opinion of Assistant Secretary French, rejecting the claim, stand as the final determination of the case.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. JOHN SHERMAN,
Secretary of the Treasury.

IMPROVEMENT OF SOUTH PASS OF THE MISSISSIPPI.

Section 3 of the act of June 19, 1878, chap. 313, does not authorize disbursements thereunder to pay debts of Mr. Eads contracted previously to the date of the act.

DEPARTMENT OF JUSTICE,

December 2, 1878.

SIR: By your letter of October 30 last, it appears that Mr. James B. Eads purchased for his purposes as a contractor with the Government a dredge-boat in 1877, which was delivered at Port Eads on November 15 of that year, and is now in his possession and use, and will be hereafter required for further use in the prosecution of his contract. Certain notes, amounting to \$17,000, are about to fall due, which are secured by a mortgage given to secure a total debt of \$100,000 upon the boat in question. Under the mortgage, if the notes are not paid within ten days after maturity, the boat can be sold to satisfy the same.

Such being the facts, you inquire whether, under the third section of the act of Congress of June 19, 1878, chap. 313, a disbursement could be legally ordered by the Department

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to satisfy such notes and release the boat from such mortgage.

In reply, I have the honor to say that the section referred to provides for the payment of "materials furnished, labor done, and expenditures incurred," from and after the passage of the act, in the construction of the works for which Mr Eads is contractor.

I am of opinion that no justification is found in the section for a disbursement to pay a debt of Mr. Eads contracted previously to the date of the act. The second section of the same statute provides for the payment to him of the sum of \$500,000, which, it may be reasonably supposed, was intended to cover liabilities incurred by Mr. Eads before the date of the passage of the act.

For a more full statement of the reasons for this view, I respectfully refer to my opinion heretofore delivered to the War Department, on September 17, 1878.

Very respectfully, your obedient servant,

CHAS DEVENS.

Hon. GEORGE W. McCRARY,

Secretary of War.

RENDITION OF PUBLIC ACCOUNTS.

The provision in section 3622 Rev. Stat., giving the Secretary of the Treasury power, when in his opinion the circumstances of the case justify and require it, to extend the time prescribed for the rendition of accounts, does not authorize him to institute a new system of rendering accounts—*e. g.*, by permitting disbursing officers to render their accounts bimonthly, quarterly, or at longer intervals, instead of monthly as now required.

That provision is intended only to enable the Secretary of the Treasury to deal with particular cases, wherein accidental circumstances make it proper to give more time for the rendition of the accounts by way of exception to the general rule.

DEPARTMENT OF JUSTICE,

December 2, 1878.

SIR: Your letter of the 18th ultimo invites my attention to section 3622 of the Revised Statutes, which directs that disbursing officers shall render their accounts monthly and

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within ten days after the expiration of each month, but authorizes the Secretary of the Treasury, if in his opinion the circumstances of the case justify and require it, to extend the time prescribed for their rendition.

You request my opinion upon the question whether the authority thus given the Secretary of the Treasury to extend the time refers to the ten days allowed after the expiration of each month, or authorizes him to permit disbursing officers to render their accounts bimonthly, quarterly, or at longer intervals.

Your letter is written with the view of instituting inquiry as to whether a reduction of clerical labor and expenses at the ordnance establishments may not be made by providing that the accounts shall be rendered at longer intervals than monthly.

An examination of the act of January 31, 1823, section 2, will show that at that time officers of the United States receiving public money were ordinarily required to render their accounts quarterly to the proper accounting officers of the Treasury. Under this statute it is understood that the practice in relation to accounts in the War Department was to transmit them to the appropriate bureau of the Department in order that they might undergo proper administrative examination, after which they were transmitted thence to the accounting officers of the Treasury.

On July 17, 1862, an act was passed, which is embraced in the section of the Revised Statutes referred to, providing for the settlement of accounts of disbursing officers monthly. And it is to be observed that the title of this act was "An act to provide for the more prompt settlement of the accounts of disbursing officers." It inaugurated a system of monthly settlements, instead of quarterly settlements. It provided that the accounts should be rendered "direct to the proper accounting officer of the Treasury, and be mailed, or otherwise forwarded, to its proper address within ten days after the expiration of each successive month."

By a joint resolution of March 2, 1867, the act last referred to was modified so that the accounts and vouchers provided for therein to be forwarded by disbursing officers were to be "sent to the bureau to which they pertain, and, after exami-

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nation there, shall be passed to the proper accounting officer of the Treasury for settlement."

The act of July 17, 1862, contained a proviso, "That the Secretary of the Treasury may, if in his opinion the circumstances of the case justify and require it, extend the time hereinafter prescribed for the rendition of accounts; and provided further, that nothing herein contained shall be construed to restrain the heads of any of the Departments from requiring such other returns or reports from the officer or agent subject to the control of such heads of Departments as the public interests may require."

The substance of all these provisions thus recited is embodied in section 3622 of the Revised Statutes. With them are incorporated certain provisions regarding accounts in the Navy Department, which do not now need to be considered.

An examination of the language of the original statute shows that the ten days allowed after the expiration of each month is an extension of time given the officer for the purpose of enabling him to prepare his accounts, such language explicitly stating that it was the time within which the officer should mail or otherwise forward his accounts. This provision, therefore, has no relation to the power given to the Secretary of the Treasury. That power authorizes him, when in his opinion the circumstances of the case justify and require it, to extend the time prescribed for the rendition of accounts. These provisions do not permit him to institute a new system of rendering accounts. They are intended only to enable accidental circumstances to be provided for by an order from him exceptional in its character.

The provision that no construction is to be given to the statute that shall restrain the head of any Department from requiring such other returns or reports from the officer or agent subject to the control of such head as the public interests may require, should receive a similar interpretation. It is intended to enable the head of the Department to require, where he may think the circumstances demand it, more frequent accounts, and is also a provision exceptional in its character.

The act of July 17, 1862, was one intended to prescribe a monthly system of rendering accounts, and when they are

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permitted to be rendered at longer periods, or are called for at shorter periods, this is done under exceptions to the general rule prescribed.

However desirable it may be to reduce clerical labor and expense at ordnance establishments by requiring that accounts shall be rendered at longer intervals than a month, I am of opinion that it cannot properly be done, because it would be a system at variance with the system prescribed by the act of July 17, 1862.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. GEORGE W. MCCREARY,

Secretary of War.

CHEROKEE INDIANS.

In the absence of an act of Congress authorizing it, the President has no authority to appoint a new board of commissioners to hear and decide all matters between the United States and the Eastern Band of Cherokee Indians, and also all differences between them and the Cherokee Nation.

DEPARTMENT OF JUSTICE,

December 3, 1878.

SIR: I have examined the paper purporting to be a petition of the Eastern Band Cherokee Indians, resident in North Carolina, by John Ross, their chief. John B. Wolf affixes his own signature to the paper, and also that of "John Ross, Chief of Band N. C. Cher." (as is alleged), by Ross's direction.

The prayer of the petition is that the President would appoint a board of commissioners to hear and decide all matters between the United States and the said band, and also all differences between them and the Cherokee Nation, the great body of which is in the Indian Territory, the findings of the board to be reported to the President for such action as he may deem best. The petitioners ask further that one member of the proposed board may be named by themselves.

It appears from an examination of the numerous treaties that have been made by the United States with the Cherokee Indians that the President has frequently appointed commissioners to negotiate treaties, and when a treaty has been rati-

Cherokee Indians.

fled, if there is provision in it for commissioners or agents to carry out any of its stipulations, the President has appointed them; but when such commission or agency has discharged its functions and has come to an end, it has not been revived, and no new commission has been created, except by act of Congress.

Thus, the President sent commissioners to negotiate the treaty of 1835, called, after the place where it was negotiated, "The Treaty of New Echota" (7 Stat., 478), and afterwards the same commissioners, or others named by the President heard and decided questions submitted to them by certain articles of that treaty. This commission was revived by a clause in the Indian appropriation act of June 27, 1846 (9 Stat., 34). A few weeks afterwards (August 6, 1846), a new treaty was made, in which (article 4) it is recited that a board of commissioners had been "recently appointed by the President of the United States to examine and adjust the claims and difficulties existing against and between the Cherokee people and the United States, as well as between the Cherokees themselves." (8 Stat., 872.)

The petitioners refer to this instance as if the President had created a new commission; but, doubtless, it was the commission under the treaty of 1835 which was revived by the act of June 27, 1846, the President appointing the members of the revived commission. To the same purpose I cite section 8 of the act of March 3, 1847 (9 Stat., 204). Here the sum of \$6,000 was appropriated, "and placed at the discretion of the President to defray the expenses of the commission *now sitting under the treaty of 1835-6.*"

It thus appears that this commission was originally created by treaty; that it was revived by act of Congress; that the members of the commission were appointed by the President; and that its functions, as pointed out by the treaties and statutes above cited, were the same as those which the petitioners ask should be vested in a new commission to be inaugurated by the President.

A proviso to the law of June 27, 1846, fixes one year as the limit to the duration of the revived commission. It expired, therefore, in 1847.

Upon this review it is manifest, I think, that the action of

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Congress is necessary to accomplish the end sought by the petitioners. It would seem to be beyond the power of the Executive to revive the old commission, or to create a new one, for the purposes indicated in the petition.

I may add, in conclusion, that if the facts are as claimed by these petitioners, they raise questions of importance which demand attention from the Government. But the petition is *ex parte*. The great body of the Cherokee tribe, whose home is west of the Mississippi River, does not join in it.

Again, the petitioners produce no proof to establish their claims. There are, doubtless, documents and instruments of evidence of record in the Interior Department which bear upon the questions presented, and the subject is one proper to be considered by the Secretary of the Interior.

The Cherokees who have moved west of the Mississippi, and whose interests are involved in these questions, should have an opportunity to be heard.

I would recommend, therefore, if the President should see fit to make further investigation with a view to bring the attention of Congress to this matter, that the whole subject should be referred to the Secretary of the Interior, and that the Cherokee Nation west of the Mississippi River should be notified of the pendency of the petition, and of the action upon it.

All that can be done by the Executive, in my judgment, is to ascertain the facts relative to the questions presented by this band of Indians. The power of Congress must be invoked, if the result of such investigation should seem to require further action.

I inclose herewith the petition, with the accompanying document.

Very respectfully, your obedient servant,

CHAS. DEVENS.

The PRESIDENT.

CASE OF ROMULUS J. PERCY.

In 1871 the Secretary of War, under authority derived from section 7 of the act of March 3, 1871, chap. 116, entered into a contract with P. for the construction of a telegraph line from Yankton to Fort Sully, in Da-

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kota Territory, upon the completion whereof, to the satisfaction of the Secretary of War, he was to be paid at the rate of \$8,000 per 100 miles. All the money so paid was to be refunded to the United States in the use of the telegraph line, and until so refunded it was to constitute a lien upon the line in favor of the United States. The entire line having been completed to the satisfaction of the Secretary of War, and P. having been paid all that was due him under the contract except \$3,500, the latter, in April, 1878, sold and conveyed the line to S., and for a valuable consideration agreed with S. to abandon and release, and actually did release, to the United States all his unpaid claim on account of constructing said line. Some time previous to this transfer, however, P. had placed his claim for the \$3,500 in the hand of certain attorneys for collection, agreeing to allow them 25 per cent. of the amount collected, and giving them an irrevocable power of attorney to prosecute and settle the claim. And in August, 1878, he filed his petition for the benefit of the bankrupt act, including in his schedule of assets the claim for \$3,500 against the United States. *Held* that the transaction between P. and S. ending in the relinquishment of the claim for \$3,500 (whereby the latter was relieved of an obligation to refund, in telegraphing, a sum of money which, if paid by the United States, would constitute a lien upon his property) was valid; and that such relinquishment operated as a bar to the collection of the claim by P., or his assignees in bankruptcy, or his said attorneys.

DEPARTMENT OF JUSTICE,
December 6, 1878.

SIR: I have considered the questions submitted to me in your communication of the 19th ultimo, and have the honor to return the papers you inclose with my opinion.

It appears from your statement, and from the papers in the case, that in 1871, pursuant to authority given by section 7 of the Army appropriation act of March 3, 1871 (16 Stat., 525), the Secretary of War entered into contract with Romulus J. Percy, by the terms of which Percy was to construct a telegraph line from Yankton, Dak., to Fort Sully, in the same Territory. Upon the completion and putting in operation to the satisfaction of the Secretary of War of each 100 miles of the line, the Secretary was to pay to Percy the sum of \$8,000; and upon the entire line being completed to the satisfaction, &c., as aforesaid, \$80 per mile for the odd miles over and above the even hundreds. As required by the law above cited, all the money so paid was to be refunded to the United States in the use of the telegraph line, and when so refunded

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the United States was to have no lien or demand upon the line except the right to use it at all times for public purposes.

Two hundred miles of the line (which is in length 243 miles and 1,341 yards) were finished, accepted, and paid for within a year after the contract was signed, but the odd miles and yards, though finished, had not been approved by the Secretary of War prior to the time that the present Secretary entered upon office, and no money has been paid upon this part of the work. It is, however, now in operation to the satisfaction of the Secretary of War, and nothing hinders the payment by him to Percy of the sum called for by the contract (about \$3,500) but certain transactions directly to be stated, to which Percy is a party.

On the 15th of April, 1878, in a letter to the Secretary of War, Percy withdrew his claim, and requested that it might be finally and absolutely dismissed, so far as he was concerned. In another paper, of the 19th of April, he acknowledges that he has received full payment, &c., and releases and discharges all claims he ever had against the Government growing out of the contract. The release is without consideration moving from the Government. This act on the part of Percy, viz, his quitclaim of a perfectly valid account for the sum of \$3,500, was brought about thus:

Zalmon G. Simmons, of Kenosha, Wis., had become the owner of the telegraph line. He received it free from all incumbrances except the obligation to refund in telegraphing moneys paid and to be paid by the Government for its construction.

The \$16,000 paid has nearly all been refunded, and the lien for that may be considered out of the case. Now, if Percy's claim for the \$3,500 could be canceled without payment by the Government, then a lien upon the line for so much money would be avoided, and, instead of refunding it in the use of the telegraph, Simmons could charge the usual rates for Government telegraphing and receive whatever the line thus earned, just the difference between receiving \$3,500 for the working of the telegraph and doing the same work without return. To accomplish this end, to wit, the cancellation of Percy's claim, Simmons first invited Percy to visit him at Kenosha. The latter, being sick and unable to leave his home in Chicago,

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sent an agent. In the negotiation which followed, as both Percy and his agent Barclay swear, Simmons threatened that he would raise a scandal against Percy; would use his letters, which were in his (Simmons') possession; would commence suits against him, and thus bring reproach upon his character and ruin his reputation if he (Percy) persisted in urging his claim against the Government. Simmons, in an affidavit, denies that he made any threats.

The negotiation ended in a written agreement signed by Simmons and Barclay, the agent, on behalf of Percy, in which the latter, "in consideration of certain moneys heretofore received by him from Simmons, and the further sum of \$300," agreed to release and forever withdraw and abandon his claim for constructing the last division of the telegraph line. By "certain moneys," the parties doubtless understood part of the consideration which Percy had received for a transfer in 1871 to the Missouri Telegraph Company of all his interest (the subsidy for the last fractional division of the line included) in the contract with the Secretary of War, and \$1,000, which, as Simmons swears, he gave to Percy in 1872, when he purchased the line of the Missouri Telegraph Company, Percy then agreeing to waive or release his account against the Government.

In pursuance of the agreement. Percy signed the papers which have been specified above, releasing to the Government all demands on behalf of the telegraph line. These releases were delivered to Simmons, and he inclosed them in a letter to the Secretary of War bearing date April 20, 1878, stating in the letter that they were executed in accordance with an agreement between him and Percy.

In an affidavit made on the 31st of May, 1878, Percy, after stating the foundation of his account against the Government and the reasons for his abandonment of it, to wit, his sick and enfeebled condition, and the threats of Simmons, which operated upon his mind, thus enfeebled, reasserted his right to the subsidy, and withdrew, unconditionally, his waiver or abandonment of it, holding, as he says, "that said subsidy is his, and but for the threats of said Simmons, said waiver would not have been given."

But long prior to this negotiation, to wit, on the 27th of May, 1877, Percy placed his claim in the hands of Messrs.

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Lowe & Archer, attorneys in this city, for collection, and agreed in writing to give them 25 per cent. of the amount collected. He also gave them an irrevocable "power of attorney" to prosecute and settle the claim. Lowe & Archer have filed this paper, and, in a communication to the Secretary of War dated May 1, 1878, protested against the acceptance by the Government of the release, setting forth that they have a "power" coupled with an interest, that this "power" is irrevocable, and consequently Percy could not settle his account against the Government except through them.

The last factor in the case is the voluntary petition of Romulus J. Percy, filed August 31, 1878, to be declared a bankrupt. In his schedule of assets is "A claim against the United States, now pending, for about \$3,500."

I am of opinion, upon this statement of facts, that the transaction between Percy and Simmons, ending in the relinquishment by Percy of his claim, was valid. The evidence is not sufficient to show that his written agreement to quit-claim to the Government was obtained by fraud and threats amounting to duress on the part of Simmons, or that there was any such inadequacy of consideration for the agreement as would induce a court of equity to set it aside. Having, for a valuable consideration, relinquished all demands against the government, he cannot cancel this act and be put in the same position as before. The thing done was not illegal. It was not a transfer or assignment of the claim, or of such an interest in it as to make it void under section 1 of the act of 26th February, 1853 (10 Stat., 170), reproduced in section 3477 of the Revised Statutes. The purpose of that act, as expressed in its title, was to prevent frauds upon the Treasury of the United States. It is apparent that the Treasury does not suffer by the transaction. The War Department is relieved of the payment in a lump of \$3,500, and instead the Government will pay for the use of the telegraph line as it has occasion to use it. On the other hand, Simmons has no control over the account, or interest in it, as a claim against the United States. He is only relieved of an obligation to refund, in telegraphing, a sum of money which, if it were

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paid by the United States, would operate as a lien upon his property. I see no legal objection to the transaction.

Percy's agreement with his attorneys, Lowe & Archer, is a personal one to pay out of a particular fund a percentage for their services in collecting it. This, without an order upon the holder, constitutes no lien upon the fund. If there were such an order, the transaction would amount to a transfer or assignment *pro tanto*, and would be void under section 3477 of the Revised Statutes. I cite the case of *Trist v. Child* (21 Wall., 441), which is directly in point. I think, therefore, that the agreement held by Lowe & Archer for a percentage of the account was no bar to the release of it by Percy.

Percy parted with his property in the account legally, as has been found above, several months prior to the filing of his petition to be declared a bankrupt. His assignee in bankruptcy, therefore, has no interest in the claim.

At the close of your letter you propound the following questions:

"1. Do the writing and the evidences, in legal effect, conclusively abandon, relinquish, or quit-claim the rights of R. J. Percy, or his assignee in bankruptcy, to the amount of the subsidy, or otherwise estop him, or such assignee, from the right to collect or receive, in part or in full, the amount for the last division of the line?"

"2. Do they, in legal effect, bar or otherwise estop said Percy's attorneys of record from the right to collect or receive, in part or in full, the amount of subsidy for the last division?"

To both these interrogatories the conclusions I have reached above require an affirmative answer.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. GEORGE W. MCCREARY,

Secretary of War.

NEWSPAPER POSTAGE.

The *Missionary Herald*, a paper issued less often than once a week—the publication office whereof is in Boston, Mass., but its subscription list as to Boston and the adjacent towns is owned by a newsdealer in

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Brookline, Mass., from whence all copies intended for subscribers in Boston are mailed by him—is chargeable, under section 5 of the act of June 23, 1874, chap. 456, only with pound rates on the copies so mailed. But that section and section 3872 Rev. Stat. are to be construed together; and accordingly where newspapers are deposited in an office within the same post-office district within which the subscribers live, they are chargeable at the rate of one cent a copy.

DEPARTMENT OF JUSTICE,*December 19, 1878.*

SIR: In answer to your letter of the 4th instant, in regard to the postage to be charged in the case of the *Missionary Herald* when mailed at the post-office in Brookline to subscribers in Boston, I have the honor to reply :

The facts appear to be as follows : The publication office of this paper is in Boston. Mr. Wing, a newsdealer in Brookline, which is outside the Boston post-office, is the owner of the subscription list of the paper as to Boston and the adjacent towns, by purchase. All copies of the paper belonging to subscribers in Boston were sent to him at Brookline, and the distribution takes place under his immediate direction.

The inquiry is whether such papers are to be mailed at pound rates, as claimed by Mr. Wing, or whether they are to be charged individually at the rate of one cent a copy.

The fifth section of the act of June 23, 1874, declares : "That on and after the first day of January, eighteen hundred and seventy-five, all newspapers and periodical publications mailed from a known office of publication or news agency, and addressed to regular subscribers or news agents, postage shall be charged at the following rates: On newspapers and periodical publications, issued weekly and more frequently than once a week, two cents for each pound or fraction thereof, and on those issued less frequently than once a week, three cents for each pound or fraction thereof."

The *Missionary Herald* is a paper which is published less often than once a week.

It is further provided by section 3872 of the Revised Statutes: "The rate of postage on newspapers, excepting weeklies, periodicals not exceeding two ounces in weight, and circulars, when the same are deposited in a letter-carrier office

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for delivery by the office or its carriers, shall be uniform at one cent each."

These two provisions of law are to be construed together. To a certain extent the section of the Revised Statutes limits the effect of the act, and must be considered as providing that where newspapers are deposited in an office within the same post-office district within which the subscribers live, they are to be charged at the rate of one cent a copy. This is the appropriate meaning, in this connection, of the words "letter carrier office." If, therefore, the Herald were mailed at the Boston post-office for delivery to subscribers in Boston, one cent postage would have to be paid.

It appears, however, by the facts as presented, that although the actual office of publication is in Boston, the person who owns the right to supply subscribers in that city resides outside of the same, and has the copies sent to him for distribution. If he does this, there is no suggestion that it is not done in good faith, or that there is a pretense of ownership or purchase merely, or that Mr. Wing is simply an agent of the publishers.

Without considering what the law might be in such a case, as the case now presented makes Mr. Wing the actual owner of the subscriptions in Boston and the towns around that city, the papers being sent to him at Brookline, his place of business, and mailed by him from there to subscribers in other postal districts, the mere fact that the paper is actually printed and published and sent to him outside of the Boston post-office district does not seem to me to present any reason why the publication may not be distributed by him at pound rates.

I answer, as you suggest, with promptness, in order that if you should deem this condition of the law one that requires attention from Congress, you may act accordingly.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. DAVID M. KEY,

Postmaster-General.

Senate Contingent Fund.

SENATE CONTINGENT FUND.

Section 2 of the act of June 19, 1878, chap. 328, providing that \$20,000 be placed to the credit of the contingent fund of the Senate, is to be construed as if the words "said investigations and inquiries as have already been," &c., read "*such investigations and inquiries as have already been,*" &c.

DEPARTMENT OF JUSTICE,
December 28, 1878.

SIR: I submit for your consideration the following reply to yours, dated this day, in reference to the meaning of the second section of the act approved June 19, 1878, entitled "An act to provide for the expenses of the Select Committee on Alleged Frauds in the Late Presidential Election."

The act in question consists of three sections. By the first, \$20,000 are added to the contingent fund of the House of Representatives, appropriated to defray the expenses of the select committee of that House, appointed under a resolution specified therein, and "directed to investigate alleged frauds in the late Presidential election." By the second, \$20,000 are placed to the credit of the contingent fund of the Senate, appropriated for "defraying the expenses of said investigations and inquiries as have already been, or may hereafter be, directed by the Senate during the period of the Forty-fifth Congress"; and by the third, \$10,000 are appropriated, to be used by the Attorney-General to defray expenses "for the detection and punishment of crimes committed against the United States in the affairs, or in the course of the investigations, mentioned in this act."

The question put by you is whether the "investigations and inquiries" spoken of in the second section are limited to the class mentioned in the first section, *i. e.*, "*investigations of alleged frauds in the late Presidential election,*" or are unlimited except as directed by the Senate theretofore or thereafter during the Forty-fifth Congress.

In my opinion, the appropriation is intended for any investigation or inquiry whatever directed by the Senate as above.

The expression quoted above, "said investigations and inquiries as have already been, or may hereafter be, directed by the Senate," is obviously a solecism. Any satisfactory

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explanation of the expression must take this circumstance into account and deal with it. The most natural method of dealing with it is by reading the word "said" *such*. The phrase "said investigations," taken *per se*, means, of course, the very investigations by a special committee ordered by the House. The title of the act might be quoted as to the same effect. It will, however, be readily admitted that this is not the true meaning of the second section, because, amongst other reasons, these investigations had already been fully provided for. It is suggested, then, that "said" is intended to refer to the class of "frauds" mentioned in the former section, and thus to confine the appropriation to investigations of frauds in the late Presidential election. There is nothing to favor this interpretation excepting the necessity of accounting for the existence of the word "said." This, no doubt, is a necessity of the case. But the solution offered does not deal with the solecism, which, as I have suggested, at once arrests the attention of the reader. At the same time, it is not more probable than the explanation that I have above submitted as true, which deals with and removes such solecism. That the expression "investigations and inquiries" is preceded by *said* and followed by *as* points at once to a ready and reasonable explanation of the difficulty; I mean that which I have adopted, and now submit for your consideration.

With great respect, your obedient servant,

S. F. PHILLIPS,
Acting Attorney-General.

Hon. JOHN SHERMAN,
Secretary of the Treasury.

CLAIMS OF COLORED SOLDIERS AND SAILORS.

Provisions of the act of December 15, 1877, chap. 3, relative to the collection and payment of bounty, prize-money, and other claims of colored soldiers and sailors, considered and construed.

All papers connected with the payment of such claims, after the bureau referred to in the said provisions is closed, should be turned over to the Second Auditor of the Treasury Department, that officer "having charge of the payment of bounties due to white soldiers."

In regard to the money in the hands of the Secretary of War for the payment of such claims: *Advised* that it be paid to the Treasurer of the

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United States, with whom it will remain appropriated for the purposes to which it is now devoted, until Congress shall otherwise dispose of it.

As by the provisions of said act the bureau referred to therein is to be closed, all administrative machinery peculiar to that institution will thereupon cease to exist.

Those provisions do not *require* that adjusted cases, for the payment of which money is now in the hands of the Secretary of War, shall, after the 1st day of January, 1879, undergo resettlement by the accounting officers of the Treasury; yet if any substantial reason exists for resettling such cases there is nothing in the statute to prevent it.

DEPARTMENT OF JUSTICE,

December 30, 1878.

SIR: The papers referred by you to the Attorney-General upon the 25th instant for an opinion have been considered, and herewith I submit a reply thereto.

Amongst those papers is a letter addressed to yourself by the Second Comptroller, which contains the case and questions to which you particularly direct attention.

From such letter it appears that upon the 15th of December, 1877, Congress made the following appropriation:

"For salaries of agents and clerks; rent of office, fuel, lights, stationery, and similar necessities; office furniture and repairs; mileage and transportation of officers and agents; telegraphing and postage, being a deficiency for the service of the fiscal year eighteen hundred and seventy-eight, twenty thousand dollars; which is appropriated to close up and finish the collection and payment of bounty, prize-money, and other claims of colored soldiers and sailors; and if the work of collecting and paying said bounty and other claims shall not be finished before January first, eighteen hundred and seventy-nine, said bureau shall be closed, and all papers connected therewith shall be turned over to the department having charge of the payment of bounties due to white soldiers."

In this connection, the Second Comptroller states that "the work of paying said bounty and other claims is not yet finished, and cannot be finished before the first of January next.

"Some of said claims are still being adjusted in the accounting offices. About \$102,000 now remain in the custody of the Secretary of War, which is held by him in trust for the pay-

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ment of the respective soldiers and sailors, and the heirs of such, who have been found entitled by the accounting officers, the most of which will undoubtedly be in that condition on the first day of January next.

"Of that amount, nearly \$7,000 has been allowed for the settlement of naval cases.

"Among the questions upon which the opinion of the Attorney-General is desired I may particularize the following:

"To whom, and in what manner, shall the papers connected with said payment be turned over?

"In what manner shall money now in the custody of the Secretary of War be treated?

"What effect has the act above referred to on the joint resolutions of July 26, 1866 (14 Stat., 367), March 29, 1867 (15 Stat., 26), and April 10, 1869 (16 Stat., 54)?

"Whether the cases, the money for the payment of which is now in the custody of the Secretary of War, shall, after the first day of January, be resettled by the accounting officers?"

Since I received this letter I have had the advantage of conference thereupon with the Second Comptroller.

1. In my opinion, the intention of Congress was that all papers connected with the payment of bounty to colored soldiers should be turned over to the depository for similar papers as regards bounty for white soldiers; and, consequently, that you will turn over the papers mentioned in the first question to the Second Auditor of the Treasury Department.

2. Nothing is expressly said in the act about the *money* specially connected with bounties to colored soldiers. The word is "papers." Still, as the *bureau* is directed to be *closed*, and as the Secretary of War holds this money as successor to the head of the Freedman's Bureau, I am of opinion that it is intended that he shall turn over the money also; but, as nothing is said as to the officer to whom he shall turn it over, I advise that it be paid to the Treasurer of the United States, with whom it will remain appropriated to the purposes to which it is now devoted, until Congress or some statute now in force shall otherwise dispose of it. I will, of course, not be understood as herein referring to the money held by the

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Secretary as trustee under section 2035 of the Revised Statutes. That fund stands upon a different footing.

3. I answer the third question by saying that, as the act closes the bureau, all special machinery in the way of agents or other officers, or of operations peculiar to that institution, ceases to exist. But any peculiar protection afforded to colored soldiers and their representatives, against false personation and other frauds, will continue so far as ordinary administrative machinery can enforce it.

4. If any substantial reason shall occur for *resettling cases*, as mentioned in the fourth question, I see nothing to prevent it, and, upon the other hand, no reason for such resettling seems to arise *merely* out of the act first above quoted.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Acting Attorney-General.

Hon. GEORGE W. McCRARY,
Secretary of War.

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The provision in the act of December 15, 1877, chap. 3—viz, that “said bureau shall be closed”—is to be understood as allowing a reasonable time therefor after January 1, 1879. The expenses incident to such work may be defrayed from the appropriation in the act of June 20, 1878, chap. 359.

DEPARTMENT OF JUSTICE,
December 30, 1878.

SIR: In reply to yours of this day, referring to the act of December 15, 1877, which has formed the subject of a communication just addressed by me to you, I submit that in directing the *bureau to be closed* Congress is to be understood as intending to allow a reasonable period for effecting such operation, provided that what shall be done after the first of January next is confined *bona fide* to closing up the bureau, of which you will judge. I am of opinion that the statute admits of it. An *instantaneous* compliance with such commands is rarely meant when not expressed.

As for the expenses incident to such work, it seems that the appropriation made by the act above referred to is not

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available, as that was limited to the year ending June 30, 1878. I see no reason why the corresponding appropriation of the act of June 20, 1878 (20 Stat., 222), may not be so applied.

Very respectfully, your obedient servant,

S. F. PHILLIPS,

Acting Attorney-General.

Hon. GEORGE W. McCrARY,

Secretary of War.

UNION PACIFIC RAILROAD COMPANY—NET EARNINGS.

Interest on the bonds issued by the Union Pacific Railroad Company under the act of February 24, 1871, chap. 67, commonly known as the "Omaha bridge bonds," is not to be deducted from the gross earnings of that company in ascertaining its net earnings.

DEPARTMENT OF JUSTICE,

January 7, 1879.

SIR: Your letter of the 27th ultimo inquires whether the interest on the bonds issued by the Union Pacific Railroad Company under the act of February 24, 1871 (which are commonly known as the "Omaha bridge bonds"), is to be deducted from the gross earnings of the company in ascertaining its net earnings.

It has always been held by the Attorney-General's Office that the net earnings mentioned in the Union Pacific Railroad act of 1862 were to be ascertained by deducting from the gross amount of the earnings of the railroad companies respectively contemplated by that act the necessary expenses paid within the year in operating the road, and those for keeping the same in a state of repair; that, therefore, no sums which were paid by the railroads in discharge either of their debts or of interest upon their debts, of any character, were properly to be deducted from the gross earnings in ascertaining the net earnings, 5 per cent. of which were to be paid to the United States.

The act of May, 1878, prescribes a rule for the railroads more favorable than this, and necessarily takes effect in all computations of such earnings subsequent to the 30th of June,

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1878, when it was to go into operation. This definition of net earnings allows the sums paid in discharge of interest by these railroads upon their first-mortgage bonds to be deducted from the gross earnings previous to ascertaining the net earnings, and this apparently upon the ground that the lien for the payment of these bonds had priority over the lien of the United States.

The same act, however, directs that all sums owing or paid by said company respectively as interest upon any other portion of their indebtedness shall be excluded from consideration in ascertaining the net earnings. This leaves the only question to be decided, whether or not the Omaha bridge bonds are first-mortgage bonds within the meaning of the statute. They cannot properly be so considered. They were issued for a particular and important purpose—the construction of a bridge across the Missouri River at Omaha, Nebr., and Council Bluffs, Iowa—under the statute of February 24, 1871, passed long subsequently to the act allowing the issuance of the first-mortgage bonds, the lien of which was to have a priority over that of the United States.

While the Omaha bridge is undoubtedly a part of the Union Pacific Railroad (*Union Pacific Railroad Company v. Hall*, 91 U. S., 343), yet the bonds are of a class readily distinguishable from the first-mortgage bonds, and come properly within the words of the statute which refer to the other indebtedness of the railroad. The exact position of these bonds, and whether they have or not a lien superior to that of the United States upon a specific portion of the road, it is not necessary now to discuss. It is sufficient to hold (as it must, I think, be held) that they are not the first-mortgage bonds described in the statute of 1878. The preamble to the statute recites: "Whereas said corporation has issued and disposed of an amount of its own bonds equal to the amounts so issued to it by the United States as aforesaid, and secured the same by mortgage, and which are, if lawfully issued and disposed of, a prior and paramount lien, in the respect mentioned in said acts, to that of the United States," &c. And the first section refers to the first mortgage bonds thus described. To this class the Omaha bridge bonds cannot be considered as belonging, and therefore the interest on these

Property Lost in the Military Service.

bonds should not be deducted from the gross earnings of the Union Pacific Railroad Company in ascertaining its net earnings.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. CARL SCHURZ,

Secretary of the Interior.

NOTE.—See, in connection with the foregoing opinion, the case of *Union Pacific Railroad Company v. United States*, 99 U. S. Rep., 402.

PROPERTY LOST IN THE MILITARY SERVICE.

* A vessel was chartered by the Quartermaster's Department at New York October 17, 1861, for a voyage of fifteen days, at a certain sum for the voyage, and a certain per diem for detention of the vessel beyond that period. The owner covenanted to keep the vessel seaworthy, and to victual, man, coal, and furnish her for the voyage; but the charter was silent with respect to the risks of the voyage. The vessel was to be laden with such cargo as might be desired by the Government officer, and as soon as her cargo was on board she was to proceed direct to Old Point Comfort, and be placed under the orders of the quartermaster there as to her future destination, and on arrival at her final destination she was to deliver her cargo and then return to New York. The vessel having arrived with a cargo at Old Point Comfort, and reported to the quartermaster at that port, by orders from the Quartermaster's Department joined the transport division of the military and naval expedition there organizing against Port Royal, S. C. The expedition put to sea October 29, 1861, and on November 3, 1861, the vessel was lost in a storm without fault or negligence on the part of her owner. The vessel was, while with the expedition, under the absolute control of the officers of the expedition as respects her course and rate of speed. Held (1) that the vessel was, by her charter, in the military service of the United States within the meaning of section 3493 Rev. Stat.; (2) that the owner not having expressly agreed to incur the risks of the voyage, the case does not fall within the exception contained in that section.

DEPARTMENT OF JUSTICE,

January 11, 1879.

SIR: It is stated in your letter of the 30th of November last (the receipt of which, with the accompanying papers, I have the honor to acknowledge) that the steamship *Peerless* was lost at sea in the autumn of 1861. Previously to her loss she had sailed from New York laden with a cargo belonging

Property Lost in the Military Service.

to the United States, under a charter party executed by agents respectively of the United States and her owner, and at the time of her loss she was sailing under orders of United States officers.

The questions to which you desire me to address myself are these :

First. Was the *Peerless* by the charter party put into the military service of the United States within the meaning of section 3483 Revised Statutes ? and, if so,

Second. Did the owner of the vessel assume the risk to which she would be exposed so as to bring him within the excepting clause of the statute ?

Third. If the boat was not in the military service by virtue of the contract, was she so by impressment ?

I quote so much of the section referred to as is applicable to the case :

“ Every person whose steamboat or other vessel is lost by unavoidable accident while such property is in the military service, either by impressment or contract, shall be allowed and paid the value thereof at the time such property was taken into the service, except in cases where the risk to which the property would be exposed was agreed to be incurred by the owner.”

It may be well to state the facts somewhat more in detail.

By charter party dated the 17th of October, 1861, the *Peerless*, with all her rigging, apparel, furniture, and the means of navigating her, was let to the United States for a period of fifteen days from the date of the contract. The owner covenanted to keep the vessel seaworthy and her machinery in perfect working order during the above period. He agreed further to victual, man, coal, and furnish her for a sea voyage. The boat was to be laden with such live stock and other cargo as might be desired by the Government officer. As soon as her cargo was on board she was to proceed direct to Old Point Comfort, and there report to the Assistant Quartermaster-General of the United States Army and be placed under his orders as to her future destination. On her arrival at her final destination she was to deliver her cargo and then return immediately to New York, her port of departure.

For the voyage of fifteen days the United States agreed to

Property Lost in the Military Service.

pay \$8,250 as full compensation; but if the boat was necessarily detained beyond that period, \$550 per day for every day so detained.

There is nothing in the contract in respect to the risks of the voyage. Under this charter party, the *Peerless*, laden with cattle, went to sea, and, on her arrival at Old Point, was reported to the quartermaster at that post. By orders received from the Quartermaster's Department, she joined the transport division of the military and naval expedition there organizing under the command of General T. W. Sherman and Commodore S. F. Dupont, against Port Royal, S. C. The expedition put to sea October 29, 1861. On the 3d of November, 1861, the *Peerless* was lost in a storm off Cape Hatteras, without fault or negligence on the part of her owner or charterers. The period of fifteen days expired with the 1st of November.

The expedition was a secret one, its purpose being known only to General Sherman, Commodore Dupont, and a few of their confidential staff officers.

Accordingly, on leaving Old Point Comfort, each vessel attached to the expedition, including the *Peerless*, was placed under sealed orders, which were to be opened only in case of a storm.

It is admitted that the *Peerless* was under the absolute control of the officers of the expedition as respects her course (being required to keep in line with, and at a certain distance from, the preceding vessel) and her rate of speed, which was regulated by the speed of Admiral Dupont's flagship. It is further stated by Lieut. J. S. Bradford (from whose affidavit these details are taken, and which are admitted by the Government to be correct) that "the instructions of those in command were very rigid and required to be implicitly obeyed; that if a vessel got out of line, fell astern, or went too far ahead, she was signalled to keep her proper place, and, if necessary, the commanding officer would run down to her and order her to keep her proper position."

The instructions contained in the sealed orders were to make the best possible speed to Port Royal; that is, in case of a separation.

Upon this statement it is obvious to remark that the serv-

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ice stipulated for in the charter party was of the utmost importance to the country. A large military and naval force was about to embark with the purpose of attacking and capturing an important seaport which belonged to the Government, but which was in the possession of its enemies. As an indispensable portion of this expedition, a fleet of transports must be provided to carry troops, provisions for their sustenance, munitions of war, and other material, the impedimenta of an army. It was essential to the success of the undertaking that its destination should be a secret in the breasts of its commanders. The nature of the service required that they should have absolute and complete control, and, in order to this, the full and undisputed possession of every vessel and her navigation. Accordingly, the whole of the *Peerless* is contracted for, no part of her is reserved for the owner's or the master's use, and the history of the voyage after her arrival at Old Point shows that she was in fact wholly in possession of those officers.

Now, whatever construction of the contract is most consistent with its purpose, and best enables the Government to carry out that purpose, must be most agreeable to its spirit and intent. From the *nature of the service*, the purpose of the Government in chartering the *Peerless*, and the action of the parties to the contract after it was entered into, the inference is fair and reasonable that it was their *intention* that the charterer should have the exclusive possession, command, and navigation of the boat; in short, that the charterer should be the owner for the voyage. The opposite view of the charter-party, viz, that it was a contract of affreightment merely, and that the owner, being only a carrier for the Government, retained the possession and command and navigation of the boat, is not only inconsistent with the service in which she was employed and the control exercised over her by the Government's agents, but such construction, if acted on, might have delayed and very much embarrassed the expedition. For, in such case, the master being the servant of the owner and obeying his instructions, might have refused to sail with the expedition unless its destination was made known to him, and even then might have declined the voyage as too dangerous—not an unreasonable determination, if, as would be true

Property Lost in the Military Service.

in such case, the owner took the risk. The Government's only remedy would have been an action of covenant, whereas its necessities required the immediate use of the vessel.

But the provisions of the contract which are supposed to require this latter construction—the owner's covenants of seaworthiness, to furnish, equip, victual, and coal the boat, to receive and deliver the cargo—were not inserted with a view to restrain or interfere with the full and free use of the vessel by the Government, but as subsidiary and subservient to such use. They are not only consistent with the possession and ownership of the vessel by the Government for the voyage, but by them it was enabled fully and beneficially to enjoy the same. These things were provided by the owner for the service of the Government.

Doubtless the *Peerless* was *sub modo* in the possession of the general owner—that is to say, to such an extent as to enable him to perform his covenant of seaworthiness, and to receive and deliver the cargo; but the boat was part and parcel of an *organized force upon the sea*, whose purpose was to attack the enemy at a point known only to its commanders. The movement of every vessel attached to it was under the control of one will—the will of the admiral. No deviation from her sailing orders was allowed to any craft belonging to the expedition, the conduct of which was intended to be like the march of an army to battle. It must be so; otherwise, the master of each vessel sailing her upon such course and at such speed as pleased him, the whole fleet might have fallen into hopeless disorder, a very mob upon the sea, and greater disaster might have followed than was caused by the gale and the storm. It was a matter of less moment to the object of the expedition that two or three transports should be lost from obedience to the sailing orders than that the whole fleet should be disorganized for the want of them. Hence the possession and command of every ship and the entire control of her was in the commander of the fleet.

By these considerations I am led to think that the *Peerless* was, by virtue of the charter-party, in the military service of the United States within the meaning of the statute.

As to the question of risk, where property of the kinds enumerated is taken into the military service there must be

License of Vessels in the Coasting Trade.

an express agreement by the owner to incur the risk, in order to exclude him from the benefit of the statute, otherwise it could have no operation. For in every *locatio rei* the owner of the thing hired takes the risk of loss by unavoidable accident. But here the statute interposes, and says the United States will pay the value to the owner unless he *agrees* to incur the risk, intending, as is apparent for the reason given, an *express agreement*. As the owner of the Peerless did not so agree, I am of opinion that the case does not fall within the exception of the statute.

Having above expressed the opinion that the Peerless was, by virtue of the Government's contract with her owner, in the military service of the United States within the meaning of section 3483, the question of impressment does not arise.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. GEORGE W. McCrary,
Secretary of War.

LICENSE OF VESSELS IN THE COASTING TRADE.

The act of April 18, 1874, chap. 110, does not exempt from the license required by section 4371 Rev. Stat. a vessel of more than five tons burden, answering to the description of a canal-boat, which is engaged in trade between different ports or districts on navigable waters of the United States, and which has never been used on a canal, was not intended to be used there, and does not in its present employment enter a canal. Opinion of October 19, 1875 (15 Opin., 52), to that extent, overruled.

It is the *use* made of the vessel, not its mechanical structure, which determines whether it is or is not entitled to the exemption allowed by that act.

DEPARTMENT OF JUSTICE,
January 13, 1879.

SIR: Upon the 5th of September last, you submitted the following question: Whether under Revised Statutes, section 4371, as amended by the act of April 18, 1874, a boat answering to the description of a canal-boat, of more than five tons burden, is required to be documented as a vessel of the United States, if found trading between different ports or districts on navigable waters of the United States, provided such boat has

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never been used upon a canal, was not intended for such use, and does not in its present employment enter a canal. You explain that your inquiry relates to such craft devoted wholly to the transportation of coal from Perth Amboy, N. J., to New York City.

In my opinion it was the intention of Congress that such vessels, so used, should be treated, if laden with domestic freight, as a foreign vessel, and if loaded with foreign goods should be forfeited (under Rev. Stat., sec. 4371), unless licensed as provided by the laws regulating the coasting trade and the documenting of vessels engaged in such trade. The act of April 18, 1874, dispenses with the necessity for such a license "to canal-boats, or boats employed on the internal waters or canals of any State." (18 Stat., 31.)

It is the *use* made of the vessel, and not its mechanical structure, that determines whether or not it is entitled to the exemption allowed by this statute.

Vessels employed as stated in your question are not excepted from the operation of Revised Statutes, section 4371, by the act of April 18, 1874.

Very respectfully,

CHAS. DEVENS.

Hon. JOHN SHERMAN,
Secretary of the Treasury.

NOTE.—The foregoing opinion may be regarded as overruling in part the opinion of Attorney-General Pierrepont, dated October 19, 1875 (15 Opin., 52), wherein it was held that vessels of more than five tons burden, usually called canal-boats, which are engaged in trade between different places or districts on navigable waters of the United States, are exempt from license or enrollment as well where in such trade they do not enter a State canal as where their voyages are partly on such navigable waters and partly on a State canal. On the subject of enrollment and license see the recent act of June 30, 1879, chap. 54, and compare opinion of September 16, 1880, *infra*.

INTERNAL REVENUE.

Where internal-revenue taxes were paid by a railroad company on dividends of its stock owned by a State, and no application has been made by the company, within the time limited by statute, for a refund: *Held* that the Commissioner of Internal Revenue has no authority to allow the amount so paid to be applied by way of set-off in discharge of a

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liability of the company for taxes arising upon a subsequent assessment.

Nor has he authority, with the concurrence of the Attorney-General and the Secretary of the Treasury, to compromise a tax legally due from such company (the same being solvent) for a sum less than the amount of the tax. The authority to compromise conferred by section 3229 Rev. Stat. does not permit the voluntary relinquishment of a part of a tax lawfully assessed upon and due from a solvent person or corporation.

DEPARTMENT OF JUSTICE,

January 14, 1879.

SIR: Your letter of November 14, 1878, informs me that there is a suit pending against the North Carolina Railroad Company for taxes due to the United States, in which the corporation claim to file a set-off of an amount paid as taxes upon its stock held by the State, and therefore not liable to taxation. This amount was paid several years ago voluntarily, and no steps were taken to have the assessment revised. It was desired that the excess collected upon the former tax-list be applied to discharge the liability upon which the action aforesaid is founded.

Thereupon you ask these questions:

"Has the Commissioner of Internal Revenue authority under the circumstances mentioned, where taxes have been paid on dividends of stock owned by a State, where no application for a refund has been made within the time limited by statute, to allow the set-off, or to make the reappropriation asked? (2) or has he the authority, by and with the concurrence of the Attorney-General and the Secretary of the Treasury, to compromise a tax legally due from this solvent corporation for a sum less than the amount of said tax?"

It is obvious that the claim set up by the company is the case of an exaction of an internal tax supposed to be illegal or excessive. The statutes have not only indicated the *manner*, but have limited the *time* in which such claims are to be presented. The assessment having been once made in due form, the Commissioner can review and reduce it only upon an appeal to him taken and prosecuted as there directed, within the statutory period. (Rev. Stat., sec 3228; *Cheatham v. United States*, 92 U. S., 85.)

To allow the excess now to be offset or reappropriated

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would be in effect to grant to this company a privilege denied to ordinary citizens in procuring a refund.

The authority conferred by Revised Statutes, section 3229, to compromise a case arising under the internal-revenue laws, does not permit the voluntary relinquishment of a part of a tax lawfully assessed upon and due from a solvent person or corporation. A compromise implies some mutuality of concession, some real doubt about the legality of the claim, or the ability to meet it, which does not exist in this case. Both of your questions are, therefore, answered in the negative.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. JOHN SHERMAN,
Secretary of the Treasury.

WABASH AND MIAMI CANAL LANDS.

The act of May 26, 1824, entitled "An act to authorize the State of Indiana to open a canal through the public lands to connect the navigation of the rivers Wabash and Miami of Lake Erie," examined and considered with reference to the subject of whether there has been a forfeiture of the right of way (including ninety feet on each side of the canal) granted to the State of Indiana by said act, and, if so, whether the United States can now assert any claim to the lands covered by said right of way.

The provision in the first section of said act, namely, that "ninety feet of land, on each side of said canal, shall be reserved from sale on the part of the United States, and the use thereof forever be vested in the State aforesaid, for a canal, and for no other purpose whatever," is a grant not of the land within ninety feet on each side of the canal, but of an easement therein, which is restricted to a particular purpose, the fee remaining in the United States.

Where the legal subdivisions out of which that estate was carved were sold or granted by the Government, the purchaser or grantee took the title thereto subject to the easement, unless the ninety feet "on each side of said canal" were excepted out of the patent.

Seem that in patenting these subdivisions no such exception was made; and therefore the United States no longer have any interest in the lands subject to the easement; but upon forfeiture of the easement the absolute property in such lands would become vested in the patentees.

A forfeiture may be declared (either by judicial proceedings authorized by law or by legislative act) in case the lands have ceased "to be used and occupied for the purpose of constructing and keeping in repair a

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canal, suitable for navigation"; but it can only be declared by or in behalf of the United States. Congress may in such case declare the forfeiture, or direct that proper legal proceedings be instituted to the end of having it declared.

DEPARTMENT OF JUSTICE,

January 16, 1879.

To the Senate of the United States :

I have the honor to acknowledge the receipt of the resolution of the Senate dated March 19, 1878, which reads as follows :

"Resolved, That the Attorney-General be hereby directed to report to the Senate whether the lands and rights granted by the United States to the State of Indiana by the act entitled 'An act to authorize the State of Indiana to open a canal through the public lands to connect the navigation of the rivers Wabash and the Miami of Lake Erie,' approved May 26, 1824 (4 Stat., 47), have, according to the terms of said act, reverted to the United States; and, if so, what action on the part of the United States, legislative or otherwise, is necessary and proper to enable it to obtain possession thereof."

I have to reply that, the Attorney-General's Office not being furnished with information upon the subject referred to, it was necessary for me to apply to the Interior Department. I inclose herewith reports of the Commissioner and Acting Commissioner of the General Land Office, dated May 1, 1878, and December 19, 1878, respectively, which purport to contain a full and complete history of the action of the Government and of the State of Indiana, under the act of May 26, 1824, and acts supplementary thereto, so far as that action is shown by the records and files of the General Land Office.

The only questions suggested by said reports which I deem material to the present inquiry are the following :

1. Has there been a breach of any of the conditions named in the granting act for which the United States can declare a forfeiture of the right of way granted ?

2. If so, can the United States now assert any claim to the lands included within said right of way ?

The first question must be answered by ascertaining whether the facts show that a breach has occurred of either

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of the conditions mentioned in the second section of said act for which a forfeiture can be declared.

Section 2 reads as follows:

"And be it further enacted, That, if the said State shall not survey, and direct by law said canal to be opened, and furnish the Commissioner of the General Land Office a map thereof, within three years from and after the date of this act; or, if the said canal be not completed, suitable for navigation, within twelve years thereafter; or, if said land hereby granted shall ever cease to be used and occupied for the purpose of constructing and keeping in repair a canal suitable for navigation, the reservation and grant aforesaid shall be void and of none effect." * * *

In relation to the first two of said conditions, Mr. Attorney-General Johnson held, in an opinion dated November 15, 1849 (5 Opin., 179), that the United States by subsequent legislative action had waived all right to insist upon a forfeiture for their breach, and that notwithstanding the State had failed in each of said particulars to comply with the conditions of the act, she had "as absolute a title to the ninety feet on each side of the canal as she would have had in the contingency of said performance."

In relation to the last of said conditions it is sufficient to state that there are no facts appearing (except those stated in a letter addressed to Senator Matthews by John C. Pettit, dated April 13, 1878, herewith transmitted) upon which to form any conclusion whether or not the lands granted have ceased "to be used and occupied for the purpose of constructing and keeping in repair a canal suitable for navigation."

If the canal has in fact been abandoned, the grant being a public grant, a forfeiture can be declared only "by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, finding the fact of forfeiture and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of ownership of the property for breach of the conditions, such as an act directing the possession and appropriation of the property, or that it be offered for sale or settlement." (*Schulenberg v. Harriman*, 21 Wall., 44.)

Assuming, however, that the lands included within the

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tract granted for a right of way have ceased "to be used and occupied for the purpose of constructing and keeping in repair a canal suitable for navigation," the question arises whether, upon a declaration of forfeiture in either of the ways above mentioned, said lands would revert to the United States and become a part of the public domain.

By the first section of said act the State of Indiana was authorized "to survey and mark, through the public lands of the United States, the route of a canal by which to connect the navigation of the rivers Wabash and Miami of Lake Erie; and ninety feet of land, on each side of said canal, shall be reserved from sale on the part of the United States, and the use thereof, forever, be vested in the State aforesaid, for a canal, and for no other purpose whatever."

The grant thus made was a grant not of the land described within the ninety feet on each side of the canal so to be surveyed and marked out, but of an easement or right of way over and through said lands, the fee remaining in the United States. The easement thus granted was restricted to a particular purpose, viz, "for a canal." The fee remaining in the United States to the lands over and through which the right of way was granted, and also to the legal subdivisions out of which this particular estate was carved, was subject to sale, or other disposition, by the Government. When such tracts were sold or granted by the Government, the purchaser or grantee, by his patent, took the title to the tract patented subject to the easement created by the grant, unless the ninety feet "on each side of said canal" were excepted out of the patent.

By the report of the Commissioner of the General Land Office, dated May 1, 1878, it appears that in accordance with the provisions of the acts of Congress approved March 2, 1827 (4 Stat., 236), May 29, 1830 (4 Stat., 416), February 27, 1841 (5 Stat., 414), August 29, 1842 (5 Stat., 542), March 3, 1845 (5 Stat., 731), May 9, 1848 (9 Stat., 219), 1,457,363.06 acres of land have been patented to said State to aid in the construction of said canal.

By the report of the Acting Commissioner of the General Land Office, dated December 19, 1878, it appears that in patenting the lands over and through which the line of the

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canal ran no exception was made of the reservation created by the act of May 26, 1824, "but on the contrary * * * the lands were disposed of without reference to the reservation for such right of way."

The latter report, although it does not purport to be based on an examination of every tract patented which was affected by said right of way, may, I think, be accepted as showing the action of the Government in relation to all of the tracts made subservient to the easement created by said act.

If it be true that all of the tracts over and through which said right of way passed were thus patented, I think it necessarily follows that, although the canal is no longer used, the United States has no interest in the lands included within the limits of the right of way. As before stated, the purchasers or grantees of the United States took the fee of the lands patented to them subject to the easement created by the act of 1824; but on a discontinuance or abandonment of that right of way the entire and exclusive property, and right of enjoyment thereto, vested in the proprietors of the soil. (Washburn on Easements and Servitudes, 228; *Jackson v. Hathaway*, 15 Johns., 447; *Westbrook v. North*, 2 Me., 179; *Robbins v. Borman*, 1 Pick., 122; *Harback v. Boston*, 10 Cush., 295; *Harris v. Elliot*, 10 Pet., 55; *Lyman v. Arnold*, 5 Mas., 198.)

Without expressing any opinion as to what acts might be deemed sufficient to warrant the conclusion that the canal had been discontinued or abandoned, I am of the opinion that when a forfeiture is declared the title to the land included within the right of way will not vest in the United States, but in the owners of the tracts through which said right of way passes. The grant by which this right of way was created being a public grant, a forfeiture can be declared only by the United States. This would also seem to be necessary, for by the last clause of the second section of the act it is provided "that said canal, when completed, shall be, and forever remain, a public highway for the use of the Government of the United States, free from any toll or charge whatever for any property of the United States, or persons in their service on public business passing through the same."

In response, therefore, to so much of the resolution as

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directs me to report "what action on the part of the United States, legislative or otherwise, is necessary," I have to state that I am of the opinion that Congress may provide by appropriate legislation for the appointment of a commissioner to examine said canal and report whether in fact it has been abandoned and ceased to be used as a public highway. If such commissioner is appointed, and his report shall show that the canal has been abandoned, Congress may then declare a forfeiture, or direct that proper legal proceedings be instituted by the Attorney-General in the courts to have a forfeiture declared.

Very respectfully, your obedient servant,

CHAS. DEVENS.

PUBLIC BUILDINGS.

The supervisors of Ontario County, New York, by authority of an act of the legislature of that State dated April 12, 1859, demised to the United States by a perpetual lease a certain part of the county court-house in the city of Canandaigua, some of the rooms within which part are used by the Post Office Department for a post-office. *Held* that the law applicable to property of that description owned by the United States applies to the property perpetually leased as aforesaid. *Semble*, however, that an expenditure for lock-boxes for the post-office therein is one that appertains to the Post-Office Department and is properly chargeable to its appropriation.

DEPARTMENT OF JUSTICE,

January 18, 1879.

SIR: Your letter of the 10th instant incloses to me a copy of a lease from the supervisors of the county of Ontario made in accordance with, and by authority of, an act of the legislature of New York of April 12, 1859, which grants a certain portion of the county court-house in the city of Canandaigua by perpetual lease to the United States.

The inquiry is "whether this property can be construed, by virtue of the existence of a perpetual lease therefor, as being a Government building under the control of the Treasury Department, in order that it may be ascertained whether the expenditure for the lock-boxes desired is one which is proper for the Treasury Department to make."

Public Buildings.

It would appear from your letter that a portion of the rooms thus perpetually leased to the United States are in the occupation of the Post-Office Department.

In regard to the perpetual lease, I think the law applicable to the case is that which applies to property owned by the United States, and that a perpetual lease of a building must properly be treated as conferring an ownership upon the United States. There is no practical difference between a perpetual lease and a title in fee.

Your inquiry, however, assumes that, if the building be one thus owned by the United States, it is for the Secretary of the Treasury to determine whether or not lock-boxes should be provided for the post-office held therein.

I would respectfully suggest that this is an expenditure that seems to me, if proper to be made, to be one which should be made under the Post-Office Department, and by virtue of its direction. By section 4051 of the Revised Statutes, all the postal revenue, including box-rents, is to be accounted for to the Postmaster-General. By section 4052, it is provided that postmasters may allow box-holders, who desire to do so, to provide lock-boxes or drawers at their own expense, which upon their erection become the property of the United States and are subject to the control of the Post-Office Department, and are to pay a rental at least equal to that of other boxes in the same office.

The Post-Office Department has an annual appropriation for office furniture of the sum of \$20,000. That amount has been appropriated for several years past. It would seem that under this appropriation the Postmaster-General might properly provide letter-boxes or lock-boxes, as he might see fit, in any post office of the United States.

The regulations of the Post-Office Department provide (Regulations of 1873, chap. 12, sec. 194): "The Post-Office Department neither owns, erects, or repairs letter-boxes in post-offices, except where the building is owned by the United States."

This regulation contemplates evidently that the expenditure for letter-boxes of all classes, if proper to be made at all is to be made under the direction of the Post-Office Department. It seems to me that the regulation is proper, and that

Injunction of State Court.

the appropriation annually made for office furniture would cover an expenditure for letter-boxes, if made by direction of the Post-Office Department.

I would therefore respectfully suggest that, while the building is one in legal contemplation owned by the United States, the expenditure to which you refer, if made at all, should be made by authority of the Post-Office Department, and is properly chargeable to its appropriation.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. JOHN SHERMAN,
Secretary of the Treasury.

INJUNCTION OF STATE COURT.

Where an injunction was issued by the supreme court of the State of New York enjoining the depot quartermaster at New York City from paying to a contractor certain funds due him for the construction of certain quarters at David's Island, in New York harbor: *Held* that the injunction is inoperative as against the quartermaster.

It is not competent to the State courts to enjoin officers of the Executive Departments from executing the lawful orders thereof, whether they concern the payment of money for the performance of contracts with the United States or any other matter.

In the above case, however, from considerations of comity between the State and National Governments: *Advised* that (before determining whether or not payments should be made notwithstanding the injunction) application be made to the court for a dissolution of the injunction so far as the quartermaster is concerned.

DEPARTMENT OF JUSTICE,

January 29, 1879.

SIR: Your letter of the 24th instant incloses a letter of the Quartermaster-General of the 18th instant, submitting therewith a letter from Col. L. C. Easton, depot quartermaster at New York City, relative to an injunction issued by the supreme court of the State of New York enjoining him from paying to William Keeney certain funds due him on contract for the construction of certain quarters at David's Island, New York harbor.

My opinion is requested as to whether this injunction should be obeyed, or whether Colonel Easton should be

Injunction of State Court.

instructed to pay to the contractor without regard to the injunction, as recommended by the Judge-Advocate General.

It has been decided that the State courts could not enjoin the United States courts from executing their judgments or proceeding with their pending actions at law. (*McKim v. Voorhies*, 7 Cran., 299; *City Bank v. Skelton*, 2 Blatch., 26.) The principle of this decision requires it to be held that it is not in the power of the State courts to enjoin the Executive Departments of the United States, or subordinate officers of such Departments, from executing any legal orders thereof, whether they concern the payment of money for the performance of contracts with the United States or otherwise.

Money in the hands of a disbursing officer of the United States, due and payable by him to a private person, cannot be attached by process out of the State courts. (*Buchanan v. Alexander*, 4 How., 20.) As remarked by Mr. Justice McLean in that case: "The funds of the Government are specifically appropriated to certain national objects, and if such appropriations may be diverted and defeated by State process or otherwise, the functions of the Government may be suspended. So long as money remains in the hands of a disbursing officer, it is as much the money of the United States as if it had not been drawn from the Treasury."

The injunction, so far as it assumes to affect Colonel Easton, therefore, could not be operative as against him. It may, however, be entirely operative as regards Mr. Keeney, unless some public interest requires that the money should be paid to him. While the injunction is inoperative as against Colonel Easton, I consider that it should not be violated by him, and this for the reason that the comity which should exist between the two Governments—State and National—would require that officers of the United States Government should not aid individuals who are amenable to the State government in violating the orders of its courts, unless public interests and rights of the United States demand it.

In the present case, therefore, I recommend that the matter be brought to the attention of the court, and that a request for a dissolution of the injunction, so far as Colonel Easton is concerned, be presented to the court, which seems to me to

 Compromise of Claims of the United States.

have improvidently issued the injunction. This course is certainly more in accordance with the respect due between the two governments than a violation of the injunction would be. If the court should decline to dissolve it, and if it should be found that the public interests require the payment to the contractor, it will then be quite time enough to consider whether or not the payment should not be made notwithstanding the injunction.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. GEORGE W. MCCRAEY,

Secretary of War.

 COMPROMISE OF CLAIMS OF THE UNITED STATES.

Under section 3469 Rev. Stat., the Solicitor of the Treasury may properly recommend the acceptance of a compromise offered in discharge of a claim of the United States before judgment, where the defendant is able to pay the amount of the claim, but where the district attorney advises acceptance upon the ground that, from want of evidence to establish the facts on which a verdict must depend, he doubts his ability to obtain a judgment. This case distinguished from that considered in the opinion of January 8, 1879 (see *infra*).

Although the case may belong to that class of cases for relief in which special provisions are found in the act of June 22, 1874, chap. 391, yet this does not prevent an application for compromise thereof being made under the more general provision in section 3469 Rev. Stat.

DEPARTMENT OF JUSTICE,

January 30, 1879.

SIR: Your letter of the 21st instant suggests that a former letter had not given fully the questions which you desired to submit to the Department, and that therefore the opinion rendered on the 8th instant did not meet all the matters which you had intended.

You now inquire whether under section 3469 of the Revised Statutes the Solicitor of the Treasury is authorized to recommend to the Secretary of the Treasury the acceptance of a compromise offered in discharge of a claim of the United States before judgment, where the proponent is fully able to pay the entire amount claimed, but in which case the district attorney recommends the acceptance upon the ground that

Compromise of Claims of the United States.

he doubts his ability to obtain a judgment, and expressly states that his doubts are based upon the want of evidence to establish the facts upon which a verdict must depend.

Section 3469 is a general section, relating to all claims in favor of the United States not elsewhere specifically provided for. The former letter from this Department expressed the opinion that under that section, where the defendant was entirely solvent, it was not the duty of the Solicitor of the Treasury to recommend a compromise upon the ground that circumstances of hardship existed affecting the defendant. It assumed that the United States was able fully to prove its claim, and merely determined that compromise ought not to be recommended because it was hard to enforce the claim.

The present inquiry, however, presents the additional fact that it is uncertain whether or not the Government can prove its case. There is therefore this distinct element in the case upon which a compromise can properly be made, resulting from the uncertainty in which the Government is placed as to its ability to obtain a verdict; and in such case it seems to me that a compromise may properly be recommended, not upon the ground that the case is a hard one as against the defendant, but upon the same ground upon which contested claims are often compromised by parties, in view of the uncertainty as to their obtaining a judgment.

It is not possible to give a definite standard by which the Solicitor should be guided in compromising claims. Among other things, however, to be taken into consideration, are the probability of obtaining a verdict and the probability of collecting the claim after a verdict is obtained. This probability may be greater or less in the various cases submitted to the Solicitor, and there is no rule that can guide him except his sound judgment as a lawyer upon the facts which are reported to him.

In rendering this opinion I have not found it necessary to consider the provisions which are made in the various parts of the statutes for a remission of fines, penalties, and forfeitures, or in mitigation or compromise of the same. Those are affected, of course, by the special provisions which relate to them. Your inquiry only discusses the general law which is embraced in the section 3469. If the case immediately before

Power of Attorney—Assignment.

us is one (as I infer from your letter it may be) relating to a forfeiture, while special provisions are made for relief in such cases, which are to be found in section 17 *et seq.* of the statute of June 22, 1874, yet those special provisions would not, in my opinion, prevent the party from applying, if he desired so to do, under the more general provision of section 3469 of the Revised Statutes.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. KENNETH RAYNER,
Solicitor of the Treasury.

POWER OF ATTORNEY—ASSIGNMENT.

S., having a contract with the Engineer Department for dredging in the Occoquan River, by the terms of which the compensation named therein was to be paid to him from time to time, gave to I. a power of attorney (declared in the instrument to be irrevocable) "to demand, receive, and receipt for, to the proper disbursing officer of the United States, all moneys, warrants, drafts, vouchers, and checks that may become due and payable to me (S.) from the United States for work," &c. Subsequently S. notified the engineer officer in charge that he revoked the power of attorney. *Held* that by force of section 3477 Rev. Stat. said power of attorney was without legal effect with respect to the claim of the contractor against the United States for his compensation; that he might at any time revoke it, and when revoked it is not for the officers of the United States to consider whether the revocation was rightful or wrongful; *Held*, further, that the instrument does not amount to a transfer of an interest in the contract so as to authorize the annulment thereof under section 3737 Rev. Stat.

The provision in said section making void "all powers of attorney, orders, or other authorities for receiving payment" of any claim upon the United States, or any part or share thereof, is not limited to powers of attorney, &c., relating to claims which are to be paid by Treasury warrant, but extends to those which relate to claims otherwise payable.

DEPARTMENT OF JUSTICE,

February 7, 1879.

SIR: Your letter of the 29th ultimo submits to me an inquiry arising upon the following state of facts:

Chauncey D. Spaulds is a contractor with the Engineer Department for dredging in the Occoquan River, and is now engaged in the performance of his contract, which stipulates

Power of Attorney—Assignment.

that installments of the consideration named in the contract shall be paid to him from time to time.

Eben C. Ingersoll has presented to the proper disbursing officer a power of attorney, which is recited at full length in your letter. This power of attorney appoints Mr. Ingersoll the lawful attorney of Spaid, such appointment to be irrevocable, in his name "to demand, receive, and receipt for, to the proper disbursing officer of the United States, all moneys, warrants, drafts, vouchers, and checks that may become due and payable to me from the United States for work," &c., &c. It further contains an agreement that Spaid will execute and deliver to Ingersoll any further power of attorney that may be necessary to assign and collect any and all warrants, drafts, or checks that may be issued under said contract; and an agreement that no other attorney shall be appointed. It also contains a power of substitution.

On the 9th of December, Spaid wrote to the engineer in charge informing him that he revoked and annulled the power of attorney.

Your first question is as follows:

"Is the power of attorney above quoted irrevocable or unaffected by the attempted revocation mentioned?"

By section 3477 of the Revised Statutes it is provided:

"All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof." * * *

It is difficult to conceive that language more general could be used in reference to claims against the United States, and its obvious intent is to enable the United States to deal solely with the persons with whom it contracts, in discharging any obligations that it may be under to them, by the provision that powers of attorney shall be absolutely null and void.

The power of attorney in question had at no time a legal

Power of Attorney—Assignment.

existence, so far as it affected the claim of the contractor against the United States. He might at any time disaffirm it, and when he himself revokes it, as it had no legal existence, it seems to me that it is the duty of the United States to recognize that revocation, and to deal with the power of attorney as if it had no actual existence. Undoubtedly, by concurrence of the parties, the United States might make payment under such power of attorney. Where there is such concurrence, payment to an attorney is as good as payment to the principal; but, under this law, the principal is always to be regarded, and when he disavows the power of attorney it is not for the officers of the United States to consider whether that disavowal was rightful or wrongful. Such a course would necessarily lead to the ascertainment of the rights of the parties *inter sese*, which it is among the objects of the statute to avoid by treating the claim of the contractor as the only one to be recognized by the United States. The latter clause of the section I am discussing provides for assignments, transfers, and powers of attorney which are to be recognized, but that does not affect the inquiry now before us.

It is suggested that this section applies only to claims which are to be paid by warrant; but every claim against the United States, after it becomes a disputed claim so that the claimant is compelled to go to the Treasury for payment by reason of its disallowance by the disbursing officer, is paid by warrant. The language is general which declares the nullity of these assignments, and the only cases where they are recognized is where a warrant is already issued. If there are any cases in which the claim could not be paid by warrant, then they do not come within the exception, but are affected by the general language.

Although the power of attorney in question is declared to be irrevocable, it is well settled that even where a power is thus declared it is yet revocable, unless circumstances exist which would make a revocation unjust to the party in whose favor it was given, or deprive him of security to which he was entitled. But, in view of the opinion heretofore expressed, it is unnecessary to inquire whether such circumstances exist in the present case.

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Readjustment of Account for Mail Service.

Your second inquiry is:

"Whether said power of attorney amounts to such a transfer of an interest in the contract as to cause the annulment thereof under section 3737, Revised Statutes?"

The construction of this instrument is that it is a power of attorney to receive moneys due the contractor. It does not assume to transfer the contract or any interest therein. What are the relations between the contractor and attorney, what was the consideration of the power, are not shown. All that appears is that it was thereby intended to authorize the attorney to collect moneys which might be then due, or thereafter become due, to the contractor. It does not profess to give the attorney any interest in the contract.

I am therefore of opinion that this instrument does not cause an annulment of the contract under the section mentioned.

Very respectfully, your obedient servant,

CHAS. DEVENS.

HON. GEORGE W. MCCRARY,

Secretary of War.

READJUSTMENT OF ACCOUNT FOR MAIL SERVICE.

An oral demand by a railroad company, through its authorized agent, for a readjustment of its account under the act of March 3, 1873, chap. 231, is sufficient in order to rebut the presumption of acquiescence in an adverse ruling of the Post-Office Department, unless there is an established practice in the Department, having the force of law, by which such demands are required to be made in writing.

DEPARTMENT OF JUSTICE,

February 10, 1879.

SIR: The question presented in your letter of the 6th instant, concerning the claim of the Saint Louis and San Francisco Railroad Company, is whether, in order to rebut the presumption of acquiescence in a ruling of your Department adverse to its claim, an *oral* demand for readjustment of its account under the act of March 3, 1873, is sufficient.

I know of no rule of law which requires that a demand upon a Department of the Government for readjustment of an account, or a protest against its decision upon a claim,

Providing and Repairing Lock-boxes.

should be made formally in a written communication signed by the party or an agent of the party; and, unless there is an established practice in your Department that such demands and protests be in writing, or that in some way they shall be made to appear upon the files and records of your Department, which practice is generally known and understood so as to have the force of law, I am of opinion that evidence that demand was made orally by the claimant or his authorized agent is admissible, and that you are not confined to the records and files of your Department for such proof.

That demand was made is a question of fact to be proved by competent testimony. Upon this point, if the case were before a court of law, the persons who made the affidavits, copies of which accompany your letter, would be allowed to testify, and if their evidence, or evidence of a like character, should satisfy the court, it would hold that a demand was proved, and that the demand was evidence that the party had not acquiesced in the ruling of the Department.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. DAVID M. KEY,
Postmaster-General.

PROVIDING AND REPAIRING LOCK-BOXES.

Opinion of January 18, 1879 (*ante*, p. 255), reconsidered, and in view of the fact that expenditures for providing and repairing lock-boxes in public buildings occupied for post-offices have hitherto been made and are still being made from an appropriation under the control of the Secretary of the Treasury, and other circumstances: *Advised* that no immediate change of this practice be made, it not being so clearly without warrant of law as to render an immediate change imperative.

DEPARTMENT OF JUSTICE,

February 10, 1879.

SIR: As requested by your letter of the 29th of January, I have reviewed my opinion of the 18th of the same month, in which opinion I suggested that the expense of providing and repairing lock-boxes in the public buildings occupied for post-offices should be met from appropriations provided for the Post-Office Department.

Appraisers at the Port of Baltimore.

Although I still think that this work should be done and paid for by that Department, yet, in view of the fact stated by you that such "expenditures have hitherto been made and are still being made from a specific appropriation" in the control of the Secretary of the Treasury (though the terms of that appropriation do not seem strictly to include the object), and believing that this practice has been acquiesced in; considering, moreover, the grave objections stated by the Postmaster-General in his letter to you of the 27th ultimo to the adoption of the course indicated in the opinion referred to, I would not advise an immediate change of the practice that has prevailed concerning this matter.

I do not consider this practice so clearly without warrant of law as to render an immediate change imperative, nor did I intend so to intimate in my opinion of the 18th ultimo; but I thought then, and still think, that the course I pointed out would better accord with the intent of the statutes which I cited as applicable to the subject, and with the rule to which I referred of the Post-Office Department.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. JOHN SHERMAN,

Secretary of the Treasury.

APPRAISERS AT THE PORT OF BALTIMORE.

Section 2549 Rev. Stat. provides for two appraisers at the port of Baltimore; but, under section 2950 Rev. Stat., an appraisement may be made by any one of them. *Held* that, in case of vacancy in the office of one of the appraisers of that port, there is no duty devolving upon the President to provide an incumbent for it, if, in his opinion, it is unnecessary to do so.

Section 1768 Rev. Stat. recognizes the existence of a discretion in the President to not fill an office which has become vacant, where, in his judgment, it is unnecessary in order to execute the laws. The office is not thereby abolished, but is merely left unfilled.

DEPARTMENT OF JUSTICE,

February 20, 1879.

SIR: A letter of Mr. H. H. Goldsborough, one of the local appraisers at the port of Baltimore, to the President, is referred

Appraisers at the Port of Baltimore.

to me by you with a request for my opinion in the matter. From this letter I understand that the question desired to be passed upon by me is whether under existing statutes the law requires two appraisers at the port named, or whether one of them may be legally dispensed with.

Section 2549 of the Revised Statutes provides for two appraisers, who shall reside at the port of Baltimore; and the argument of Mr. Goldsborough is that, as Congress has provided for two such officers, it is not competent for the Secretary of the Treasury to dispense with one of these officials, if, in his opinion and that of the President, the duties could be efficiently performed by one appraiser—that the Congressional will having been expressed by the act, one of the offices created cannot be abolished, but that it is the duty of the President, acting through the Secretary of the Treasury, to fill it with a suitable incumbent.

The section 2549 is derived from the act of March 1, 1823, before the passage of which there were no official appraisers, but the appraisement was made under the direction of the collector by an appraiser appointed by him in each case and another appointed by the merchant whose goods were to be appraised. The two appraisers contemplated by this act were evidently intended to take the place of the two unofficial appraisers who had theretofore executed the law.

Since the statute of March 3, 1851 (embodied in section 2950 of the Revised Statutes, which provides: "The certificate of any one of the appraisers of the dutiable value of any imported merchandise required to be appraised shall be deemed to be the appraisement of such merchandise required by law to be made by such appraisers" * * *), there seems to be no difficulty in making an appraisement with but one appraiser; and it is probable that the intention of the law was to enable this to be done, especially as it also contains provision as to the mode to be adopted where there are no appraisers.

If, then, the work to be done at Baltimore can be done by one appraiser, and if to-day there were a vacancy in the office, which, on account of the limited amount of business or for any other reason, the President should desire not to fill, it would seem that the provision of the tenure of office enactment,

Discharge of Seamen in Foreign Port.

section 1768 of the Revised Statutes, would authorize him not to fill it. One clause of this provision enacts that "the President shall, within thirty days after the commencement of each session of the Senate, except for any office which in his opinion ought not to be filled, nominate persons to fill all vacancies in office," &c. This is a recognition by the law that the President is not obliged to fill an office if in his opinion it is unnecessary in order to execute the laws.

It is suggested in the letter of Mr. Goldsborough that it is not competent for the President to abolish an office which has been instituted by Congress; and this is true. But in the case mentioned the President does not abolish the office. It is merely left unfilled, because in his opinion it is unnecessary to fill it. It is, therefore, in the condition of an existing office, and it may undoubtedly thereafter be filled if subsequent experience should show, either to the President or his successor, the necessity of filling it.

In the case presented by Mr. Goldsborough, therefore, should the office be vacated by his resignation, there is no duty devolving upon the President to provide an incumbent for it, if, in his opinion, such incumbency is unnecessary.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. JOHN SHERMAN,

Secretary of the Treasury.

DISCHARGE OF SEAMEN IN FOREIGN PORT.

The action of a consul, in the exercise of the discretion given him by sections 4580, 4581, 4583, and 4584, respecting the discharge of seamen in a foreign port, is not reviewable otherwise than by some competent court.

Where a consul has collected extra wages of the master of a vessel in a foreign port, or requested collection of such extra wages on the arrival of the vessel in the United States, it is not competent to the Secretary of the Treasury or any bureau of the Treasury Department, in the examination of the accounts of the consul, to do anything more than revise the amount of the collection and determine its arithmetical accuracy.

DEPARTMENT OF JUSTICE,

February 20, 1879.

SIR: Yours of the 2d ultimo calls my attention to sections 4580, 4581, 4583, and 4584 of the Revised Statutes, relating

Duty on Glass Bottles.

to the collection from the master of a vessel of extra wages on account of a seaman discharged by the order of the American consul in a foreign port, and requests an expression of my opinion upon the following questions, viz:

1. "When, in the exercise of the discretion vested in him by the sections of the statutes referred to, a consular officer shall have decided that a discharge of seamen should be granted, is that decision to be regarded as final and conclusive, and subject to no revision other than by a court of competent jurisdiction?"

2. "When a consular officer shall have collected extra wages of the master of a vessel in a foreign port, or shall have requested collection of such extra wages on the arrival of a vessel in the United States, is it competent for the Secretary of the Treasury, or any bureau of the Treasury Department, in the examination of the accounts of said officer, to do anything more than revise the amount of said collection?"

An examination of these sections, and reference to section 1736, making the consul civilly and criminally liable for any abuse of power, leads me to conclude that his action is not reviewable otherwise than in some competent court, and that the Treasury Department has only to examine the account to determine its arithmetical accuracy, and not to treat the question of the original propriety of the discharge as though it were, *de novo*, before that Department upon appeal.

I therefore answer your first question affirmatively, and the second in the negative.

Very respectfully, your obedient servant,

CHAS. DEVENS.

HON. JOHN SHERMAN,
Secretary of the Treasury.

DUTY ON GLASS BOTTLES.

Glass bottles in which importations are made, whether containing free or dutiable goods, are subject to duty, unless expressly exempted; the duty thereon being (under section 2504, Schedule B, Rev. Stat.) 30 per centum ad valorem where not otherwise provided for.

DEPARTMENT OF JUSTICE,

February 20, 1879.

SIR: Yours of the 15th instant submits, substantially, the question whether or not bottles are liable to duty distinct

Duty on Glass Bottles.

from that imposed upon the substances with which they are filled, or in case the contents are not dutiable; the particular instance in which the point is raised being upon an importation of olive oil in bottles or flasks, which section 2504, schedule M, Revised Statutes, declares subject to "one dollar per gallon."

It is true that in *Karthauss v. Frick*, under the tariff of 1832, Taney, C. J., held that the charge of a *specific* duty upon an article in a particular form or vessel is a charge upon the whole article as described, including the vessel or material described as containing it; so that salt, paying "ten cents per 56 pounds," was to be admitted without charge for the sacks containing it (Taney, C. C. Rep., 94). But bottles have in many tariff acts been made an exception to this rule, and seem to be so under existing legislation. From the earliest to the present tariff there has always been a discrimination against wines imported in bottles compared with that in casks. The act of January 29, 1795, c. 17, § 3, last clause (1 Stat., 411), provided "that bottles in which *any* liquor is imported shall be subject to the payment of the like duty as empty bottles." So in act of 1842, c. 270, § 8, item 5 (5 Stat., 560), &c. (*De Bary v. Arthur*, 93 U. S., 423, top.)

Schedule B of the before-mentioned section (2504) of the Revised Statutes, p. 462, imposes upon "glass bottles or jars, filled with articles not otherwise provided for, 30 per cent. ad valorem"; * * * "and all glass bottles or jars filled with sweetmeats or preserves, not otherwise provided for, 40 per cent. ad valorem." If, in making this compilation, the phraseology of the previously existing statute is somewhat changed, a purpose to alter its effect by the language adopted in the revision is not to be inferred, but the contrary. The act of March 2, 1861, c. 68, § 17, expressly imposed this duty of 30 per cent. on "*all* glass bottles or jars, filled with sweetmeats, preserves, or other articles." (12 Stat., 167.) The act of June 30, 1864, c. 171, § 8 (13 Stat., 211), last clause of that section, placed the duty on "all glass bottles and jars filled with sweetmeats or preserves, not otherwise provided for," at 40 per cent. ad valorem. This left bottles filled with other articles to pay 30 per cent., unless otherwise provided for. In this state of legislation the revision is made.

Franking Privilege of Members of Congress.

It must be deemed to have continued the same duty as existed under these acts of 1861 and 1864 upon the articles in question. Certain bottles filled with liquors, mineral waters, &c., are specifically taxed, and so are otherwise provided for, and still-wines bottles are so provided for by the explicit declaration that no duty shall be levied upon them. *Expressio unius, &c.*

In my opinion the bottles, whether containing free or dutiable goods, in which importations are made, should be subjected to duty, unless expressly exempted, as in the case of still-wines, &c.

The question is not free from doubt. A dissatisfied importer can have it authoritatively determined, while the Government can bring it to a judicial decision only indirectly by exacting the tax.

The papers which accompanied your letter are herewith returned.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. JOHN SHERMAN,

Secretary of the Treasury.

FRANKING PRIVILEGE OF MEMBERS OF CONGRESS.

Members elect of either house of Congress are, under section 7 of the act of March 3, 1877, chap. 103, entitled to exercise the privilege of franking public documents as soon as the term for which they were elected commences, although no session of the Congress has convened and they have not qualified. The language used in that section is to be construed with reference to similar legislation formerly existing (of which a review is given in the opinion), and must be interpreted as intended to restore the franking privilege, so far as it relates to public documents, for the term for which the members are elected, with the additional period therein stated.

DEPARTMENT OF JUSTICE,

February 26, 1879.

SIR: Your letter of the 19th instant incloses a letter from the Speaker of the House of Representatives and inquires in regard to the right of a member elect of either house of Congress to frank public documents, &c.

Franking Privilege of Members of Congress.

I understand the inquiry to relate to the question whether a member elected to either house of Congress is entitled to exercise the franking privilege as soon as the term for which he was elected commences. There can be no question, it seems to me, as to the non-existence of such a right at any time previous to the commencement of such term. The question therefore, as proposed, involves the right of members elect of either house of Congress, whose term commences on the 4th of March, to exercise the privilege of franking public documents during that portion of the term which may intervene between the commencement thereof and the actual session of the Congress; in other words, whether members elect are entitled to the privilege prior to their having taken the oath of office, their term having actually commenced.

I have made a somewhat careful examination of the legislation on the subject of the franking privilege, and I find that by the act of February 20, 1792, its existence was limited to the "actual attendance in any session of Congress, and twenty days after such session."

The acts of May 8, 1794, March 2, 1799, and April 30, 1810, limit the privilege in the same way as the act of 1792.

By the act of April 9, 1816, the limitation is "for thirty days previous to each session of Congress, and for thirty days after the termination thereof."

By the act of March 3, 1825, the limitation is during "actual attendance in any session of Congress, and sixty days before and after such session."

By the act of March 2, 1833, the limitation is "from the period of sixty days before he (the member) takes his seat in Congress until the meeting of the next Congress."

By the act of March 3, 1845, the limitation is "during each session of Congress, and for a period of thirty days before the commencement and thirty days after the end of each and every session of Congress," and to frank "written letters from themselves during the whole year."

By the act of March 1, 1847, the limitation as to public documents is during their "term of office" and "up to the first Monday of December following the expiration of their term of office." As to letters and packages not weighing

Franking Privilege of Members of Congress.

over two ounces, "up to the first Monday in December following the expiration of their term of office."

By the act of March 3, 1863, there was no distinction made between documents and letters, and the limitation was "to commence with the term for which they are elected, and to expire on the first Monday of December following such term of office."

By the act of June 8, 1872, there was the same limitation as in the act of March 3, 1863.

The franking privilege was wholly abolished by the act of January 31, 1873 (17 Stat., 421).

The seventh section of the act of March 3, 1877, is as follows:

"That Senators, Representatives, and Delegates in Congress, the Secretary of the Senate, and Clerk of the House of Representatives, may send and receive through the mail all public documents printed by order of Congress: and the name of each Senator, Representative, Delegate, Secretary of the Senate, and Clerk of the House shall be written thereon, with the proper designation of the office he holds: and the provisions of this section shall apply to each of the persons named therein until the first day of December following the expiration of their respective terms of office."

This latter act restores the franking privilege so far as public documents are concerned; and the phrase with which section 7 concludes, extending the privilege "until the first day of December following the expiration of their respective terms of office," quite distinctly indicates that it is to endure during the term and for the time named thereafter.

It will be observed, after examination of the legislation referred to, that the various statutes from 1816 to 1847 conferred the privilege for a certain time previous to each session of Congress; that in 1847 it was conferred during their "term of office" and "up to the first Monday of December following the expiration of their term of office;" and that this language was substantially followed in the statutes of 1863 and 1872.

When, therefore, Congress restores the privilege, so far as it relates to public documents, to "Senators, Representatives, and Delegates in Congress," the language it uses should be

Franking Privilege of Members of Congress.

construed with reference to the legislation as it had before existed, and may fairly be interpreted as intending to restore the privilege for the term for which the members are elected, with the additional privilege also granted.

It is suggested that in the provision by which members are allowed to draw their pay previous to an actual session of Congress they are termed "Representatives elect," and that in the act in question they are spoken of as "Representatives," and that it must be considered, therefore, that in the use of the latter term Congress intended a Representative who had actually qualified by taking the necessary oaths; but an examination of the statutes will show that the word "members" (meaning "Representatives") is used not unfrequently in them where the context shows that members elect only are intended.

Thus in section 30 of the Revised Statutes the provision for the administration of the oath by a member to the Speaker, and the administration of the oath by the Speaker to the members, indicates distinctly that the "members" there referred to are gentlemen who have not taken the oath.

Section 28 Revised Statutes refers to a "Senator," and yet so terms him when he has not taken the oath.

Section 34 Revised Statutes, which uses the word "members," may apply either to members who have or have not taken the oath.

It does not seem to me, therefore, that it can be argued that because the words "Representatives elect" are used in the provision of law in regard to the payment of salaries, it follows that the use of the word "Representatives" in the section under discussion necessarily means Representatives who have taken the oath.

A practical difficulty is suggested in ascertaining who are "Senators, Representatives, and Delegates" until they are actually qualified by the taking of the oath of office, but this would seem to be easily provided for by an appropriate Departmental regulation. The same difficulty existed under the previous legislation, and it was apparently found susceptible of an easy remedy. If he is entitled to be spoken of as a Senator or Representative whose term of office has actually commenced, to whom the proclamation of the President would be

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addressed if an extra session of Congress were called, and whose duty it would be to attend upon the summons, there would seem to be no trouble in determining sufficiently for all practical purposes who such persons are. They are those who possess the certificates of election, and of this fact the Postmaster-General might require by regulation any such evidence as he would deem practically sufficient. Thus, if the credentials of a Senator had been presented in the Senate, and there accepted (which is understood to be the custom of the Senate previous to the term for which Senators are elected), this would be certainly sufficient evidence to the Department. So, if the Representative elect had filed his certificate with the Clerk of the next preceding House, who has certain duties to perform in the organization of the succeeding House, and evidence of that fact were furnished, it would be sufficient to authorize the Postmaster-General to treat him as a person entitled to this privilege. When Senators and Representatives are actually sworn in, it would be the duty of the Department to take notice of the fact. Previous to that time it might require any evidence which it deemed appropriate.

The result, therefore, to which I come, upon an examination of the question submitted by the Speaker to yourself, is that members are entitled to this privilege from the commencement of the term for which they are elected, although no session of Congress has actually been called, and they have therefore not been able to take the oath of office.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. DAVID M. KEY,
Postmaster-General.

CASE OF THE STEAMER SMIDT.

The tonnage tax collected from the steamer Smidt in the years 1868, 1869, 1870, and 1872 (it having arrived at the port of New York from Bremen four times in the year 1868, five times in 1869, twice in 1870, and four times in 1872), was exacted in contravention of the treaty of December 20, 1837, between the United States and the Hanseatic Towns; the ninth article of which treaty (containing the most favored clause), when

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read in connection with the fourth article of the treaty of July 17, 1858, between the United States and Belgium, providing that steam vessels of the United States and the Hanseatic Towns in *regular* navigation between the United States and the Hanseatic Towns shall be exempt in both countries from the payment of duties of tonnage, &c.

The word "regular" in that provision is used in contradistinction to *occasional*; it refers to steam vessels which, alone or with others, constitute *lines*, and not to such as are regular in the sense of being properly documented.

The act of June 19, 1878, chap. 318, does not authorize an allowance of interest on the amount of the tonnage tax unlawfully exacted.

DEPARTMENT OF JUSTICE,
February 28, 1879.

SIR: The case presented by the papers inclosed with yours of the 11th instant, in reference to the steam vessel Smidt, is as follows:

By the ninth article of the treaty of December 20, 1837, between the United States and the Hanseatic Towns (*the most favored section clause*), read in connection with the fourth article of the treaty of July 17, 1858, between the United States and Belgium, it is provided that *steam vessels of the United States and the Hanseatic Towns in regular navigation between the United States and the Hanseatic Towns shall be exempt in both countries from the payment of duties of tonnage, anchorage, buoys, and light-houses.*

The present application relies upon that provision as ground for claiming a refund of certain tonnage tax collected from the Smidt in the years 1868, 1869, 1870, and 1872, amounting in all to \$2,136.40 (see letter of the collector transmitted by you), or, including a claim for interest, to \$3,153.10. The method of relief resorted to is that specially given by the act of June 19, 1878. (20 Stat., 171.)

From the letter of the collector above referred to, it appears that the Smidt arrived at the port of New York from Bremen four times in the year 1868, five times in 1869, twice in 1870, and four times in 1872.

Upon consideration, then, following the language of the above-mentioned act of 1878, I am satisfied that the tonnage tax was exacted of the Smidt in contravention of treaty provisions.

In my opinion, the word "regular" in the above treaty is

Assignment of Government Contract.

used in contradistinction to *occasional* rather than to *unlawful*. In other words, it refers to steam vessels that, alone or with others, constitute lines, and not merely to such as are regular in the sense of being properly documented under the laws of the country to which they belong, &c. In the treaty with Belgium the word *regular* is used in the fourth article only, although the second, third, fifth, and other articles also concern vessels engaged in commerce, that is, even in the absence of the word *regular*, vessels properly documented, &c. The definition given in Article 10 is strongly to the same effect. Such compliance is, as it seems, taken for granted, and regarded as stipulated for, without express language to that effect. The word *regular*, therefore, suggests that the privilege conferred by the fourth article depends upon some policy in favor of steamship *lines* between the two countries. That the Smidt was so employed appears plain upon the face of the facts above given.

As regards interest, a comparison of the act of 1878 with section 2931 of the Revised Statutes, for which it is a substitute, makes it plain that there has been neglect by the claimants in making claim. They might long ago have availed themselves of the provisions of that section, so generally resorted to in such cases. The act of 1878 has relieved them from the bar created by their neglect, but nothing is said about the *interest* which is recoverable under the peculiar machinery of the *section*, which gives an action *against the collector*. I therefore conclude that it was not the intention of Congress to allow interest.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. JOHN SHERMAN,
Secretary of the Treasury.

ASSIGNMENT OF GOVERNMENT CONTRACT.

S., having a contract with the Engineer Department to perform certain dredging, entered into an agreement with G., by which it was stipulated that S. should furnish two-thirds and G. one-third of the money, material, or labor necessary for the execution of the contract; that in case of loss by reason of such execution the loss should be borne in the proportion of two-thirds thereof by S. and one-third by G., and that the net proceeds should be divided between them in the same propor-

Assignment of Government Contract.

tion: *Held* that such agreement is an assignment of an interest in the contract, and falls within the provision of section 3737 Rev. Stat., declaring that "no contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party," &c.

That provision is intended only for the protection of the United States. The Government may avail itself of the assignment or transfer to annul the contract, but is not compelled so to do. (Reaffirming opinion, on this subject, of April 27, 1877—see 15 Opin., 245-6.)

DEPARTMENT OF JUSTICE,

March 7, 1879.

SIR: Your letter of the 20th ultimo submits to me certain papers relating to the alleged transfer of a share or interest in the contract of Mr. Chauncey D. Spaid with the Engineer Department for dredging in the Occoquan River, and requests my opinion whether the instrument among the papers termed "articles of agreement" between Mr. Spaid and Mr. Groat operates as an assignment, under section 3737 of the Revised Statutes, of the contract between said Spaid and the United States.

Upon examination of the section referred to, it will be seen that it declares: "No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party," &c.; and the inquiry therefore is whether the instrument mentioned is a transfer of the contract of Mr. Spaid or of any interest therein.

An examination of this paper shows that after a recital of the contract between Spaid and the United States, and of the desire of Groat "to obtain an interest in the net proceeds of the said contract in consideration of furnishing one-third of the cost of executing the same either in money or labor," it is agreed that Spaid shall furnish two-thirds of the money, material, or labor necessary for the execution of the contract; that Groat shall furnish one-third of the money, material, or labor necessary for the execution of the contract; that in case of loss by reason of such execution the loss is to be borne in the proportion of two-thirds thereof by Spaid and one-third by Groat; and that the net proceeds are to be divided in the proportion of two-thirds thereof to Spaid and one-third to Groat.

This agreement must be considered as an assignment of an

Assignment of Government Contract.

interest in the contract equal to one-third thereof. It entitles and obliges Groat to perform one-third of the contract by furnishing that proportion of the money, material, or labor necessary to its execution, subjects him to one-third the loss in case the contract should be unprofitable, and authorizes him to receive one-third of the profit in case it should prove otherwise. Such an instrument was intended to operate, and must be construed to operate, as an assignment of a one-third interest in the contract, which assignment (as between himself and Spaid, were there no other parties concerned) Groat could undoubtedly enforce by proper proceedings.

Your letter further inquires whether the section 3737 is mandatory upon the officers of the Government in so far as to require them to view the transfer of an interest, or the whole, as absolutely voiding the contract.

The object of the statute is to protect the United States; and the expression that "such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned," shows clearly the object of the section. Were it to be held that a transfer of an interest would absolutely avoid the contract, it would enable any party making a contract with the United States to avoid it by simply transferring an interest therein, which is a construction obviously inadmissible.

In an opinion which I had the honor to deliver to you on April 27, 1877, in reference to certain contracts made with one Ordway, I had occasion to consider the subject; and I here repeat the remarks there made, applying them to the case under consideration. After holding in that case that the transfer was one of an interest in the performance of the contract, I added: "The statute in question is, however, intended only for the benefit of the United States; and while it is said that such transfer shall cause the annulment of the contract or order transferred, it is intended only that it shall do so in case the United States declines to recognize such transfer. While, therefore, the United States may avail itself of such transfer to annul the contract, it is not compelled so to do."

Very respectfully, your obedient servant,

CHAS. DEVENS.

HON. GEORGE W. MCCREARY,
Secretary of War.

Subletting of Mail Contract.

SUBLETTING OF MAIL CONTRACT.

Where a mail contractor, after having correspondence with another person preliminary to subletting his contract to him, which contemplated an agreement to be thereafter made between them, orally agreed with such person as to the details of the service and the amount the latter was to receive for the performance thereof: *Held* that this did not constitute such a subcontract as is provided for by section 3 of the act of May 17, 1878, chap. 107.

An oral contract is not sufficient to entitle the subcontractor to the benefit of that section.

DEPARTMENT OF JUSTICE,
March 7, 1879.

SIR: Your letter of the 28th ultimo informs me that Zimri McDonald is the mail contractor on route No. 13097, from Plymouth, N. C., to Franklin, Va.; that by order of August 26, 1878, permission was given him to sublet the service; and that on December 7, 1878, said order was rescinded for reasons satisfactory to the Department. The letter inquires whether certain correspondence submitted with it constitutes a subcontract, such as is contemplated by the statute of May 17, 1878, and one which can be reported to the Auditor of the Treasury for the Post-Office Department as provided in the third section of said statute.

It may perhaps be questioned whether the copy of a contract contemplated by said statute can ever be one which is to be extracted from a mass of correspondence. It is, however, unnecessary to consider that point at present, as, upon examination of the correspondence in question, it does not establish a contract.

It would be tedious to recapitulate the various letters. It is sufficient to say that they indicate correspondence preliminary to a contract, and contemplating an arrangement thereafter to be made; and the statement of Mr. Fisher, who claims the benefit of the alleged contract, is that after the time for meeting and closing the details of the employment was arranged it took place, and that "it was agreed by said McDonald that said Fisher should receive the full amount allowed by the Department for carrying said mail, to wit,

Offense against Foreign Government.

the sum of \$4,237 per annum." The actual agreement was therefore oral. While the letters indicate that it was expected that Fisher was to perform the service for McDonald, they do not show any agreement as to the sum that he was to be paid for such service; and, unless supplemented by this oral evidence, they are too imperfect to base a contract upon.

The only remaining question therefore is whether an oral contract is sufficient to entitle the party to the benefit of the third section of the act of May 17, 1878. •

An examination of that section shows that only a written contract was intended. To have the benefits of the section the party must file in the office of the Second Assistant Postmaster-General a copy of the contract, notice of which is to be sent to the Auditor of the Treasury for the Post-Office Department. There is, then, a full detail of the facts which are to be embraced in the notice. It was not expected that the accounting officers should be left to the duty of sifting the evidence upon which an oral contract is necessarily based. The duty which they were subsequently to perform, namely, that of retaining out of the amount due the original contractor the amount stated in the notice of the filing of a copy of the contract, sent to them by the Second Assistant Postmaster-General, was one that could only be performed upon definite information, which could only be conveyed to them by the officer named by his having a copy of the contract.

In the case in question, I am therefore of opinion that no contract has been shown, such as is contemplated by the third section of the act of May 17, 1878.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. DAVID M. KEY,
Postmaster-General.

OFFENSE AGAINST FOREIGN GOVERNMENT.

An American vessel, having been embargoed in a port of Brazil by competent authority, was unlawfully taken out of the port and out of Brazilian waters by her master, without payment of the required charges. The Brazilian Government requests that measures be taken by this

Offense against Foreign Government.

Government against the master to redress the injury to the fiscal interests of Brazil resulting from his act. *Advised* that the act charged against the master was not a violation of any statute of the United States, and that, in the absence of a statutory provision applicable to the case, no prosecution therefor could be maintained in the courts of the United States.

DEPARTMENT OF JUSTICE,

March 13, 1879.

SIR: I have the honor to acknowledge the receipt of your note of the 10th instant, and documents therewith, relative to the case of the captain of the schooner Mauna Loa, belonging to the merchant marine of the United States. It appears from the statement of Councillor Borges, the minister of Brazil near this Government, in his letter of the 26th ultimo, that the Mauna Loa, having been embargoed by competent judicial authority in the port of Fortaleza, in the province of Ceara, in the Empire of Brazil, was by her captain taken out of that port and out of Brazilian waters illegally and by stealth, "without having paid the required charges and without the authorization of the president of the province or the captain of the port." There is reliable information that the vessel has recently put into the port of New York.

Following the instructions of his government, the Brazilian minister requests the Secretary of State to adopt measures against the captain of the Mauna Loa to redress the injury to the fiscal interests of the Empire of Brazil resulting from his misconduct.

You submit the case to me "with a view to a prosecution for any breach of the laws of the United States by the captain of the schooner Mauna Loa or by any other persons referred to in the correspondence inclosed."

Upon an examination of the statutes, I do not find that the master of the vessel, or any person connected with the transaction described by the Brazilian minister, has violated any law of the United States. The act charged was not committed against the sovereignty of the United States or against the operations of the Government of the United States, but against a foreign government. It would require a special statutory provision to enable the authorities of the Government to reach the case. In the absence of such pro-

Violation of Foreign Revenue Law.

vision, no prosecution for the acts alleged to have been committed can be maintained in the courts of this nation.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. F. W. SEWARD,

Acting Secretary of State.

VIOLATION OF FOREIGN REVENUE LAW.

Where the master of an American vessel, which was under detention by the customs authorities at a port in Jamaica, escaped with his vessel in violation of the British revenue laws: *Advised* that there is no statute of the United States under which the master is liable to prosecution in the courts of this country for the act alleged.

DEPARTMENT OF JUSTICE,

March 13, 1879.

SIR: Acknowledging the receipt of your letter of the 10th instant, inclosing a note of the 28th ultimo from the British minister at this Capital, in which he described the violent action of Mr. Harrison Phipps Snow, master of the schooner *White Wing*, in escaping with his vessel while under detention at Port Antonio, Jamaica, and thus evading the British customs laws, I have the honor to state, in reply to your inquiry, that I do not find, upon examination, any statute of the United States by which the master of the vessel above named can be held liable in the courts of the United States for his acts which were done in violation of the British revenue laws.

Mr. Justice Story, in section 245 of his work upon the "Conflict of Laws," observes "that it has become an established formulary of the jurisprudence of the common law that no nation will regard or enforce the revenue laws of any other country;" and again, in section 257, he says: "It has been long laid down as a settled principle that no nation is bound to protect or to regard the revenue laws of another country; and, therefore, a contract made in one country by subjects or residents there to evade the revenue laws of another country is not deemed illegal in the country of its origin." He cites as authority the following English cases: *Boucher v. Lawson*, Cas. Temp. Hard., 84, 89, 191; *Holman v. Johnson*, Cowper,

 State War Claims.

341; *Biggs v. Lawrence*, 3 Term R., 454; and *Clugas v. Penaluna*, 4 Term R., 466; to which I may add the authority of Sir Robert Phillimore, in the case of the *Halley*, 2 Adm. & Ecs. Cases, 3. On page 18 he declares "it is a maxim of private international law, not indeed universally recognized, but I think firmly incorporated into the jurisprudence of the country, that the courts of one state cannot be required to administer the criminal laws of another," and the context shows that he extends this doctrine to the merely penal laws of a foreign state.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. F. W. SEWARD,

Acting Secretary of State.

 STATE WAR CLAIMS.

The limitation prescribed by section 3489 Rev. Stat., for auditing and paying certain claims against the United States, does not apply to war claims in behalf of States for which provision was made by the act of July 27, 1861, chap. 21.

The words in that section, "for collecting, drilling, or organizing volunteers," must be understood, in view of the construction which they had received in previous legislation, as meant to be descriptive of and as applying to that class of war claims only which had theretofore been provided for by the acts of August 5, 1861, chap. 51; July 5, 1862, chap. 133; February 9, 1863, chap. 25; and June 15, 1864, chap. 124; the provisions of these acts, to which reference is made, being construed to cover claims of individuals, and not those of States, for the subjects therein designated.

The act of July 12, 1870, chap. 251, section 4, which repealed the appropriation (indefinite in amount) made by the aforesaid act of July 27, 1861, contemplated that the duty of auditing the claims of States presented under the last-mentioned act should continue to be performed by the accounting officers, and that in future Congress would provide for their payment by appropriations based upon estimates submitted.

It is the duty of the administrative officers of the War Department and the accounting officers of the Treasury Department to proceed with the examination and auditing of these claims, that proper estimates may be submitted to Congress therefor.

DEPARTMENT OF JUSTICE,

March 14, 1879.

SIR: Your letter of the 7th instant inquires "whether section 3489 of the Revised Statutes bars the claims of States

State War Claims.

presented after June 30, 1874, from examination and settlement by the accounting officers of the Treasury."

The language of that section is as follows:

"No claims against the United States for collecting, drilling, or organizing volunteers for the war of the rebellion shall be audited or paid unless presented before the thirtieth day of June, eighteen hundred and seventy-four." * * *

Taken in its ordinary sense, it would seem that this language was sufficiently broad and comprehensive to include the claims of States of the character now under consideration, and it would be necessary to hold that it did so were it not apparent that the phrase "for collecting, drilling, or organizing volunteers for the war of the rebellion" had acquired a sense more limited in connection with the legislation upon this subject.

The act of July 27, 1861 (12 Stat., 276), made a general appropriation (not limited in amount) "to pay to the governor of any State, or to his duly authorized agents, the costs, charges, and expenses properly incurred by such State for enrolling, subsisting, clothing, supplying, arming, equipping, paying, and transporting its troops employed in aiding to suppress the present insurrection against the United States."

In a previous act of July 17, 1861, and also in a subsequent act of February 25, 1862, "making additional appropriations for the support of the Army" (12 Stat., 264 and 345), are to be found definite appropriations for similar expenses incurred by the States, amounting in the aggregate to twenty-five millions. These provisions are not involved in the question herein considered.

By the fourth section of the act of July 12, 1870 (16 Stat., 250), the appropriation (indefinite in amount) made by act of July 27, 1861, above cited, was repealed. The act of 1870 contemplated, however, that the duty of auditing the claims of States presented under the latter act should continue, as before, to be performed by the accounting officers, and that in future Congress would provide for their payment by appropriations based upon estimates submitted.

In addition to the provisions made by the above-mentioned acts for settling and paying war claims, all of which apply to claims of States exclusively, other provisions were made by

State War Claims.

Congress for settling and paying claims of like character by appropriations directed to meet expenses incurred "for collecting, drilling, or organizing volunteers." See act of August 5, 1861 (12 Stat., 316); act of July 5, 1862 (*ibid.*, 508); act of February 9, 1863 (*ibid.*, 643); act of June 15, 1864 (13 Stat., 126). These latter provisions were construed to cover claims of individuals, and not those of States, for the subjects therein designated. The claims of States for like subjects were regarded as otherwise separately provided for. Thus, in General Order No. 70, issued from the Adjutant-General's Office September 3, 1860, it was announced "that the appropriation 'for collecting, drilling, or organizing volunteers under the acts authorizing the President to accept the services of five hundred thousand men' is intended for the payment of all expenses that may hereafter be incurred therefor, as well as for the reimbursement to individuals of such amounts as have been already justly and actually expended by them in raising troops that have been, or may be, received into the service of the United States," and it is added: "Claims of States for expenditures heretofore made by them in raising volunteers are provided for by separate and distinct appropriations, and will not be paid from the one now referred to."

This early construction of the War Department, by which a distinction is made between the claims "for collecting, drilling, or organizing volunteers," and the claims which States might have for expenses incurred by them, was kept up, so far as I have been able to find after a careful examination of the legislation and the practice thereunder, to the end.

The fund appropriated to the satisfaction of claims "for collecting, drilling, or organizing volunteers" had not been exhausted up to the 1st of July, 1874, on which day the total balance of the appropriation then remaining was carried to the surplus fund under the provisions of the act of June 20, 1874.

The act of March 3, 1873 (17 Stat., 500), provided "that no claims against the United States for collecting, drilling or organizing volunteers for the war of the rebellion shall be audited or paid unless presented before the end of the fiscal year ending June thirtieth, eighteen hundred and seventy-

State War Claims.

four." This is the enactment intended to be embodied in the section 3489 of the Revised Statutes, although a change was made by the use of the words "the thirtieth day of June" as the final day of limitation, in place of the words "the end of the fiscal year ending June thirtieth," by which apparently the time of limitation was shortened by the length of a day.

I am of opinion that the limitation of section 3489 Revised Statutes does not bar the auditing of claims in behalf of States made under the act of July 27, 1861, where the same have not been presented before the 30th day of June, 1874.

The language of the act of limitation, "claims against the United States for collecting, drilling, or organizing volunteers," must be understood, in view of contemporaneous construction and legislation, as descriptive of and referring to that class of claims, and that class only, for which provision had theretofore been made in the appropriations "for collecting, drilling, or organizing volunteers." As the war claims of States were by the construction given to those appropriations excluded from that class of claims (of which Congress must be presumed to have been aware), it is but reasonable to infer that in employing in the act of limitation in question terms of description exactly corresponding with those used in the appropriations Congress meant that these terms should receive the same construction which had theretofore been put upon them. The words used are words which have acquired in the legislation a more limited sense than that which would be attributed to them if they were to be construed without reference to other legislation. They do not, therefore, impose a limitation upon the war claims of States.

The question presented is undoubtedly one of much embarrassment and difficulty, upon which the officers of the Treasury and of the War Department have differed. There is now no appropriation available to meet these State war claims, and it will be hereafter for Congress to determine whether it will make such appropriation. The result to which I arrive is, however, entirely satisfactory to my mind; and I deem it the duty of the administrative officers of the War Department and the accounting-officers of the Treasury to proceed with the examination and auditing of these claims, in order

Revenue Marine Service—Suspension of Officer.

that proper estimates may hereafter be submitted to Congress therefor.

This answer to your first inquiry renders an answer to the second question contained in your letter superfluous.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. GEORGE W. MCCRARY,

Secretary of War.

REVENUE MARINE SERVICE—SUSPENSION OF OFFICER.

D., a third lieutenant in the Revenue Marine Service, was suspended in October, 1878, by the President, who, during the ensuing session of the Senate, submitted his name thereto for its consent to his removal. The session of the Senate ended without any action by that body upon the removal. *Held* (1) that officers of the Revenue Marine are in the civil service of the Government as contradistinguished from the naval and military service (reaffirming opinion of November 13, 1877, 15 Opin., 396), and their suspension and removal are governed by the law applicable to civil officers; (2) that upon the adjournment of the Senate, D., by virtue of section 1768 Rev. Stat., became reinstated as an officer of the Revenue Marine.

Upon the facts presented, the cadet in the Revenue Marine Service who was appointed after the suspension of D., under the act of July 31, 1876, chap. 246, is not affected by D.'s reinstatement; there having been at the time of the appointment an actual vacancy in the service which the Secretary of the Treasury was authorized thus to fill.

DEPARTMENT OF JUSTICE,

March 22, 1879.

SIR: Your letter of March 10, 1879, submits certain questions in regard to the suspension of Mr. Devereux as third lieutenant in the Revenue Marine Service on October 30, 1878, and contains certain facts in regard to the examinations which Mr. Devereux failed to pass which do not seem to be important in reference to the inquiries submitted by you. Those inquiries are whether, the Senate having failed to act upon the removal of Mr. Devereux, whose name was sent to that body for its consent thereto, he is now reinstated in his grade as an officer in the Revenue Marine Service; and again, whether a cadet who was appointed, not to the vacancy of

Revenue Marine Service—Suspension of Officer.

Mr. Devereux, but under the provisions of the act of July 31, 1876 (19 Stat., 107), is to be removed or deprived of pay until Mr. Devereux shall again be suspended.

In a communication which I had the honor to send to the President on November 13, 1877, I expressed the opinion that officers in the Revenue Marine Service are in the civil service of the Government, as contradistinguished from the naval and military service. This being so, the rules which govern the supervision and removal of Mr. Devereux must be sought in those which concern civil officers.

Under section 1768 (Rev. Stat.) the President has authority to suspend any civil officer until the end of the next session of the Senate. If, when that time arrives, the Senate shall have failed to consent to a removal of the officer in question, either directly or by confirming in his place another, the officer resumes his position in the civil service.

Mr. Devereux was, therefore, reinstated in his grade as an officer in the Revenue Marine Service at the end of the session of the Senate.

The cadet in question was not appointed in place of Mr. Devereux. By the law, when there are vacancies in the position of third lieutenant in the Revenue Marine Service, the Secretary of the Treasury is authorized to appoint a cadet. According to the facts stated in your letter, it appears that there is not now, nor has there been for some years, the full complement of officers in the Revenue Marine Service authorized by law, there being, in fact, three vacancies. There was therefore authority, at the time when the cadet was appointed, to appoint three cadets, and the appointment actually made cannot be considered as vacated by the reinstatement of Mr. Devereux in his position as third lieutenant. There was a sufficient number of vacancies at the time of the appointment of the cadet which the Secretary was authorized to fill.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. JOHN SHERMAN,
Secretary of the Treasury.

CASE OF LIEUTENANT GREELY.

G., while holding a commission as second lieutenant of infantry, dated March 7, 1867, and being on the list of unassigned officers created under the provisions of the act of March 3, 1869, chap. 124 (which affected infantry regiments and the officers thereof only), received and accepted a commission as second lieutenant in the Fifth Cavalry, to rank from July 14, 1869, the date of his transfer to that regiment, and has since been promoted in ordinary course to a first lieutenantcy therein. Before accepting his first commission in the cavalry, he remonstrated against the refusal of the War Department to rank him according to the date of his commission in the infantry. *Held* that, on being transferred to the cavalry, G. was not entitled to take rank from the date of his commission in the infantry, but from the date of his transfer, and that the action of the War Department in giving his new commission the latter date was correct; *held*, further, that his commission as an infantry officer was necessarily vacated by his acceptance of a commission in the cavalry.

DEPARTMENT OF JUSTICE,
March 22, 1879.

SIR: Your letter of March 12, 1879, submits to me certain questions of law arising in the case of First Lieut. Adolphus W. Greely, Fifth Cavalry, United States Army.

The facts and the statute directly affecting them appear to be as follows: The act making appropriation for the support of the Army approved March 3, 1869, provided by section 2 "that there shall be no new commissions, no promotions and no enlistments, until the total number of infantry regiments is reduced to twenty-five, and the Secretary of War is hereby directed to consolidate the infantry regiments as rapidly as the requirements of the public service and the reduction of the number of officers will permit." In effecting the consolidation therein provided for, an unassigned list was created, which in July, 1869, contained the names of seventy-nine second lieutenants. Among these was Second Lieutenant Adolphus W. Greely, of the Thirty-sixth Infantry.

On the 15th of July he was assigned in orders to the Second Artillery. This order was revoked at his own request, and he was afterwards assigned to the Fifth Cavalry. His infantry commission was dated March 7, 1867, but he received and accepted a commission in the Fifth Cavalry to rank from July 14, 1869, the date of his transfer, and has since remained,

Case of Lieutenant Greely.

and been promoted in ordinary course to the rank which he now holds of first lieutenant, in that regiment. Before he accepted his commission he remonstrated against the refusal of the War Department to rank him according to the date of his commission in the infantry.

Upon this state of facts the first question which arises is as follows: Was Lieutenant Greely in law entitled, upon his transfer, July 14, 1869, to the Fifth Cavalry, to take rank from the date of his commission in the Thirty-sixth Infantry, to wit, March 7, 1867?

It will be observed that the law in question affected infantry regiments and the officers therein only. In order to provide for officers who were rendered superfluous in the infantry, it was deemed just to transfer them to the other arms of the service. But it is obvious that this could not legally be done in any way that would affect the rank of officers in those arms of the service which were not in any way touched by the legislation referred to. This rendered it impossible to transfer to the cavalry or artillery any but second lieutenants or officers who would consent to accept the position of second lieutenant, for the obvious reason that first lieutenants and captains, being entitled to their rank, would necessarily displace officers in those arms of the service. This was of course provided for, and no officers were in fact transferred except of the grade of second lieutenant. When thus transferred it would have been equally unjust to an officer in the cavalry of the grade of second lieutenant to place above him an officer of the infantry whose commission was of an earlier date, for the same reason that has been heretofore suggested—that the cavalry was in no way affected by the legislation; and the desire which was naturally felt in the War Department to provide for as many infantry officers as possible could not be allowed to interfere with the rights of the officers in the other arms of the service. It was therefore necessary that Lieutenant Greely, on being transferred to the cavalry service, should accept a commission as of the date when he was thus transferred, or at any rate of such a date that it could in no mode infringe upon the rights of any officer in the cavalry.

If further reason were necessary in this case, it is readily

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found in the circumstance that the commission was offered to and was accepted by Greely. It makes no difference that he remonstrated against the date that was assigned him. It was the only date of which he could properly have received the commission, and by accepting it he secured the important advantage of not being left among the officers who were unassigned to any regiment, who were placed in the condition of awaiting orders, and who were liable thus to be retired from the Army as superfluous.

The fact that Lieutenant Greely has, since the date of his commission, been promoted to another grade, that of first lieutenant, would seriously add to the complication which would be found to exist, if it were determined that there was any wrong to him for which he was entitled to a remedy. But, in my opinion, both because the original act of the War Department was correct, and because Lieutenant Greely himself did distinctly accept his new commission as an officer of the cavalry of a date later than that which he held as an officer of infantry, there is no wrong to him requiring any remedy. His commission as an officer of infantry was necessarily vacated by his acceptance of the commission as second lieutenant in the cavalry.

The answer which I have given to the first question proposed in your letter renders a reply to the second question therein superfluous.

I have the honor to be, very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. GEORGE W. MCCRARY,
Secretary of War.

MILITARY PRISONS—COURT-MARTIAL JURISDICTION.

A soldier was sentenced by a court-martial to be dishonorably discharged from the service and to be imprisoned in the military prison at Fort Leavenworth for two years. While in confinement under this sentence he committed offences punishable by the Articles of War, for which he was a second time tried by court-martial and sentenced to imprisonment in the same prison for an additional term of three years, which he is now serving out. *Held* that under section 1361 Rev. Stat. valid authority exists for the trial by court-martial of prisoners in the mili-

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tary prisons, who, while serving out the term of their imprisonment, commit offenses punishable by military law, although they have been discharged from the Army by the sentence under which they are imprisoned.

Such prisoners are to be regarded as still connected with the military service and subject to military government, for the purposes of discipline and punishment; and the sentence, part of which is dismissal from the service, must be understood to not do away with that relation during their imprisonment.

DEPARTMENT OF JUSTICE,
March 26, 1879.

SIR: The case presented by the papers transmitted by your letter of the 4th instant is this: A soldier, for desertion, was sentenced by a court-martial to be dishonorably discharged from the military service and to be imprisoned in the military prison at Fort Leavenworth for two years. While undergoing this sentence he committed offenses punishable by the Articles of War, for which he was a second time tried by court-martial, and condemned to imprisonment in the same prison for another term of three years. He is now serving out this second term of imprisonment.

The first question which you submit for my opinion is in substance this: Was the second trial authorized by section 1361 Revised Statutes, the prisoner having been previously discharged from the military service?

The statute referred to is as follows: "All prisoners under confinement in said military prisons, undergoing sentence of courts-martial, shall be liable to trial and imprisonment by courts-martial under the Rules and Articles of War, for offenses committed during the said confinement."

Manifestly this language covers the case. All prisoners confined by sentence of court-martial in the military prisons (of which that at Fort Leavenworth is one), if they commit offenses while so confined, shall be liable to be tried by court-martial. There is no exception—no proviso excluding from the act prisoners a part of whose sentence is dismissal from the service. Nor can I doubt that it was the intention of Congress in passing the act to bring within its purview this class of cases.

The chapter of the statutes in which section 1361 is found, as amended by the act of May 21, 1874 (18 Stat., 48), is wholly

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devoted to the establishment of military prisons at Rock Island and Fort Leavenworth, to their conduct and government, and the discipline of the prisoners. It is provided that all the officers of these prisons, and even the guards and attendants, shall be detailed from the Army; that they shall be visited and inspected by Army inspectors. The purpose of the law is manifest throughout to subject the prisoners to military surveillance and discipline. They are governed exclusively by military law, and for offenses committed by them they are to be tried under the Articles of War. They are thus entirely subjected to military jurisdiction. A person undergoing punishment in one of these prisons, though by the same sentence dismissed from the Army, is still under this military government and jurisdiction. Though no longer a soldier, he is a military prisoner, and for the purposes of discipline and punishment is still connected with the military service. It is a case, to use the language of the Constitution, "arising in the land forces of the United States." It grows out of the prisoner's relation to the Army. Under the power to make rules for "the government and regulation of the land and naval forces," Congress has provided that cases of this class shall be tried by court-martial. This law being in force, sentence was passed upon the prisoner, and though a part of it be dismissal from the service, it must be so construed and understood as not to take away his liability under this law to be tried by court-martial for offenses committed during his imprisonment which are punishable by the Articles of War. The law cannot be made of non-effect by the sentence.

Certain other offenses committed by persons not belonging to the Army, and which affect the safety, the government, and discipline of the Army, are by statute also punishable by court-martial. (See No. 60 and 63 of the Articles of War, and section 1343 Revised Statutes.) By these laws spies, retainers in camp, and soldiers, dismissed or discharged, who while in the military service commit the crimes enumerated in the Sixtieth Article of War, are made amenable to military justice. These cases, like the one in hand, may be well said to arise "in the land forces," because of the relations which the parties sustain to the Army, and because the offenses are against the order and discipline of the Army.

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I think, therefore, that section 1361 Revised Statutes authorizes the trial by court-martial of convicts in the military prisons, who, while serving out the term of their imprisonment, commit offenses punishable by military law, although they are discharged or dismissed from the Army by the same sentence which condemns them to imprisonment; and I am further of opinion that this statute when applied to such cases is not liable to constitutional objection.

Your second inquiry arises from a decision of the United States district judge for the district of Kansas, upon the petition of one Ira Wildman, to be brought up on habeas corpus and to be discharged from the custody of the governor of the Leavenworth military prison. The case is exactly parallel in its facts to that stated in the beginning of this paper. The application was denied. The opinion of Judge Foster is among the papers transmitted with your letter, and you state that it is understood to be the only judicial interpretation which the statute under consideration has received, meaning of course in its application to cases of the same class as that before the court and the one now in hand.

You ask as to the propriety of your interfering (contrary to this judgment) to arrest the execution of sentences in similar cases.

You will have anticipated my answer. Such interference is not proper or advisable because of any lack of authority in the law for the sentences; and I will add that even if I thought the judgment of the court in Kansas erroneous, or otherwise than sound, which I do not, and if I were less confident than I am of the correctness of my own view of the statute as above expressed, I should still say that the general rule is applicable which requires an executive officer to administer the statutes according to their plain intent, until, by repeal or on being declared unconstitutional by competent judicial authority, they cease to be law.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. GEORGE W. McCrary,
Secretary of War.

Graduates of Naval Academy—Relative Rank.

GRADUATES OF NAVAL ACADEMY—RELATIVE RANK.

Opinion of August 7, 1877 (15 Opin., 637), in the cases of Ensign Qualtrough, Master Turner, and others of the Navy—involving the question of relative rank among graduates of the Naval Academy, as between members of the same class—reaffirmed.

Advised that the construction given to the act of July 15, 1870, chap. 295, at the Naval Academy—viz, that midshipmen, although graduates, were nevertheless not entirely emancipated from probationary study, but that, after graduation, they were still (as theretofore) to be students at sea, and that while so students at sea a provisional relative rank was assigned them by the statute, but it was not intended by such legislation to abolish the old discipline by which a final graduating examination was to have effect upon the relative rank which they should have after emancipation—be not disturbed.

DEPARTMENT OF JUSTICE,

March 31, 1879.

SIR: Your communication of the 28th of January, 1878, inclosing a copy of a letter addressed to you on the — of the same month by Lieut. W. H. Turner, together with the printed argument which accompanied it, has been received.

The cases of Messrs. Turner, Qualtrough, and others of the Navy have again been attentively considered in connection with these papers and the arguments presented by the counsel for these officers.

I see no reasons for changing the conclusions previously announced by this Department upon this subject, or for restating in full the argument by which they are sustained.

I call attention briefly, however, to two or three circumstances which seem to be considered by the memorialists worthy of examination.

First. The fact that the nominations to the Senate were made and ratified by lists which gave to each name the number assigned to the student at the close of his academic examination is deprived of weight by the circumstance (admitted by the claimants) that such nominations were expressly so made upon conditions subsequent, and, as I learn from the Navy Department, such conditions have been inserted in like nominations ever since 1862, and, for such nominees, have been uniformly interpreted as including the effect of all future

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examinations, whether competitive in their character or merely for promotion.

Second. Mr. Qualtrough's complaint in substance is that—the statute of 1870 (in force at the time of his graduation) requiring that students at the Naval Academy should be called cadet midshipmen, and that after graduation they should become midshipmen with the relative rank established at graduation, and thereafter should be promoted ensigns as vacancies might occur—at a certain period of his academic career he was by the authorities declared a midshipman with a certain relative rank, and was treated as such, but that some year or more afterwards, previously to promotion, he was subjected to a competitive examination, lowered in rank and promoted, and still considered of such lower rank.

The construction given to the statute of 1870 by the authorities at the Academy has been that midshipmen, although graduates, were nevertheless not entirely emancipated from probationary study, but that after “graduation” they were still (as theretofore) to be students at sea; that while so students at sea a provisional relative rank was assigned them by the statute, but that it was not intended by such legislation to abolish the old discipline by which a *final graduating* examination was to have effect upon the relative rank which they should bear after emancipation.

I see no reason for disturbing this conclusion by whatever course of argument it may be attempted to be met. Honorable and very intelligent gentlemen, alive to the interests of their profession, entirely impartial, no doubt privy to the adoption of the legislation in question, and required by their official duties to administer it, have decided upon a perusal of the context of this statute, in connection with previous legislation and regulations, that it was not intended thereby to abolish a principal feature in the course of *probationary* instruction, to wit, sea service. No mere doubts upon the legal question thereby presented would justify a reversal of that opinion here; and there does not seem to me to be any necessity for rediscussing the general topic.

If the will of Congress was mistaken upon this point, the character of that mistake rendered it proper to apply to that body for relief. In the former opinion the circumstance that

SENTECE OF COURT-MARTIAL—CONFIRMATION OF.

such application had been made without success was alluded to as showing an acquiescence by Congress in the ruling of the academic authorities.

I mention this because it would seem, from a brief filed in the case of the present application, that the scope of that allusion was misunderstood by the memorialists.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. R. W. THOMPSON,

Secretary of the Navy.

SENTENCE OF COURT-MARTIAL—CONFIRMATION OF.

Where an Army officer was sentenced to dismissal from the service, and the sentence, without having been approved by the President, was carried into effect under orders of the War Department: *Held* that the subsequent recognition by the President of the vacancy thus occasioned by making an appointment during a recess of the Senate, or a nomination to that body (followed by the issuance of a commission with the consent of the Senate) of a person to fill the place of such officer, operates as a confirmation by him of the sentence and orders.

Whether a sentence of court-martial has been confirmed by the President is to be determined by evidence, no specific form for this act having been provided by statute.

DEPARTMENT OF JUSTICE,

April 1, 1879.

SIR: Your letter of the 20th ultimo proposes the following inquiry:

“Where an officer of the Army is dismissed under a sentence of court-martial which was not ‘favorably approved’ by the President within the meaning of the one hundred and sixth Article of War and section 1229 Revised Statutes, but which was actually carried into effect under orders of the War Department, does the subsequent action of the President in appointing in recess of the Senate, or in nominating to the Senate, *vice* the officer dismissed, a successor in his office, operate to cure any informality or defect in the previous expression of the Executive approval of the sentence and to render the dismissal legal and effectual from the date of such appointment or of such nomination when confirmed?”

Sentence of Court-martial—Confirmation of.

The question whether a sentence has been confirmed by the President is one always to be determined by evidence. No specific form for this act has been provided, either by the article of war or elsewhere by statute. The case supposed is one which assumes that all the proceedings for the dismissal of the officer have been regular, with this important exception, that the sentence had not been "formally approved" by the President.

If at the time that the act was done by the War Department, of actually dismissing the officer, the sentence had not been confirmed by the President, it does not admit of doubt that the sentence, and thus the act done, could be confirmed at a subsequent period by him, and this upon the well-settled principle that a subsequent ratification is equal to a prior command. When, therefore, he recognizes the vacancy occasioned by that dismissal as existing, and acts accordingly by an appointment of an officer to the vacancy, it should be deemed to be a confirmation of the sentence referred to, because it is a distinct and clear recognition of the consequence of that sentence. He cannot lawfully do the act which he does unless he has approved the sentence.

In this aspect, in direct answer to your inquiry, I therefore reply that in the case supposed an appointment by the President during a recess of the Senate, or a nomination to that body by him, of a person to fill the office of the party dismissed the service, operates from the time that it was made as a confirmation of the sentence of dismissal, assuming that these acts are followed by the issuance to the appointee of a commission with the consent of the Senate.

Whether or not, in the interval that ensued between the informal dismissal of the officer and the act done by the President which operated to confirm the sentence, the officer is to be considered as having been an officer of the Army, is not a question before me.

It should be observed, however, that the approval by the President is to be inferred from a subsequent act done by him, and that such act is in its nature revocable. The inference could not be made, should the act in point of fact be revoked before the rights of others had intervened and while it remained revocable by the President. In the case supposed,

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therefore, as the appointment during the recess or the nomination to the Senate are both revocable acts until a commission with the approval of the Senate is actually issued to the appointee, should the President, upon learning the facts upon which the vacancy was assumed to exist, determine to revoke his own act, the matter would still be within his control, and he might properly do so. When, however, the act of the President in recognition of the vacancy becomes irrevocable by the action of the Senate upon the appointment or nomination and the subsequent issuance of a commission, then it must be legally inferred that the sentence upon which the whole is based has been approved by him.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. GEORGE W. McCLEARY,
Secretary of War.

CHEROKEE INDIANS.

The question considered in opinion of December 3, 1878 (*ante*, p. 225), relative to the authority of the President to appoint a new board of commissioners under the seventeenth article of the treaty of 1835-'36 with the Cherokee Indians, re-examined, and the same conclusion reached as is indicated in that opinion. This conclusion is here based solely on the ground that by the act of June 27, 1846, chap. 34, which revived the commission and prohibited its continuance beyond one year, the intent is manifest that it should not again be revived or renewed, and that the power of Congress to put an end to the operation of said treaty provision cannot be questioned.

DEPARTMENT OF JUSTICE,

April 7, 1879.

SIR: John B. Wolff, in an amended petition on behalf of the Eastern Band of Cherokee Indians, asks the President, under the seventeenth article of the treaty of 1835-'36, to nominate, and by and with the advice and consent of the Senate appoint, commissioners to hear and pass upon the claims which these Indians have against the United States and against the Cherokees who have moved into the Indian Territory.

In an opinion rendered to the President on the 3d of De-

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ember last, upon the question as presented by the first petition of these parties, I stated in substance that when a board of commissioners appointed by the President under the treaty had discharged its functions and come to an end, the commission had not been revived and no new commission had been created except by act of Congress. This statement is inaccurate. I will endeavor to correct the error by briefly recounting the appointments that have been made under the seventeenth article above mentioned.

The treaty was ratified May 13, 1836. The seventeenth article, as amended by the Senate, is as follows:

"All the claims arising under or provided for in the several articles of this treaty shall be examined and adjudicated by such commissioners as shall be appointed by the President of the United States, by and with the advice and consent of the Senate of the United States, for that purpose, and their decision shall be final; and on their certificate of the amounts due the several claimants, they shall be paid by the United States."

Under this article, by statute of July 2, 1836, appropriation was made for the compensation of commissioners for two years. The first board of commissioners was then appointed. They opened their session on the 7th day of December, 1836. On the 17th of January, 1839, they were instructed by the Department of War to close their business and report the results of their labors. This was done March 5, 1839, and the commissioners were discharged. The matter so rested until the 26th day of August, 1842, when Congress again appropriated a sum for the compensation of two commissioners to examine claims, &c., under the treaty. These commissioners were, as before, appointed by the President, with the concurrence of the Senate, in the autumn of 1842.

But prior to the appropriation for this second board, to wit, on the 7th of March, 1842, the question of the power of the President to nominate new commissioners arose in the Senate upon a resolution introduced by Hon. A. H. Sevier, Senator from Arkansas, "directing the President to appoint three commissioners to adjudicate claims of the Cherokees residing east of the Mississippi River." The resolution having been referred to the Committee on Indian Affairs, Hon. Mr. Morehead,

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Senator from Kentucky, reported that "the committee are clearly of opinion that the President of the United States has full power in virtue of the seventeenth article of the treaty to *renew* the commission at his pleasure until *its objects* are fully carried into effect. This committee, therefore, refrain from recommending any action on the part of the Senate, and ask to be discharged."

Upon this expression of opinion by the Senate, which was concurred in by the Secretary of War, he (the Secretary) asked for and obtained the appropriation last above referred to.

The second board organized in November, 1842, and continued to sit as a commission until January 17, 1844, when the members of it were severally removed by the President.

On the 3d of June following, their successors were appointed in the same manner as before; but on the 17th of the same month there was attached to the law making appropriation for their compensation this proviso, "that the duration of the commission should not extend beyond one year after the passing of the act." (5 Stat., 691.)

Here, then, Congress asserted its power to put an end to the existence of the commission, and the President approved the act. By this limitation the commission expired June 17, 1845. Then came the act of June 27, 1846 (9 Stat., 34), which "revived" the commission and provided that it should "continue for one year and no longer." Under this law, commissioners were again appointed July 23, 1846. Their term of office and the commission itself came to an end July 24, 1847.

By these acts of 1844 and 1846, Congress plainly manifested a determination to give the finishing stroke to this commission, and it may be fairly inferred from this legislation that it was considered that the objects for which the commission was created would be at the time of its extinguishment substantially accomplished.

And so the subject has been suffered to rest for more than thirty years. The act of 1846 has been regarded as putting an end to the question. It revived the commission and prohibited its continuance beyond one year. The intent is manifest that it should not again be revived or renewed.

The authority of Congress to put an end to the operation of this article of the treaty, even to terminate the treaty itself,

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will hardly at this day be controverted; but after the lapse of so long a period, during which the parties interested seemed to have acquiesced in the disposition of this matter made by the legislative power, the Executive would not, in my judgment, be justified in raising the question whether that power was lawfully exercised by nominating to the Senate a new board of commissioners.

It will be seen that, upon the reconsideration of this question, I have reached the same conclusion as before, but have abandoned one of the positions taken in my former opinion, and this because of fuller and more accurate knowledge of the facts relative to the course of administration under the seventeenth article of the treaty—facts gathered from official documents which were not before me on the previous occasion, but have since been obtained by application to other Departments of the Government.

My opinion is now based entirely upon the laws above quoted, which, until changed by further legislation, must be regarded as disposing of the subject.

Very respectfully, your obedient servant,

CHAS. DEVENS.

The PRESIDENT.

ADVERTISING PUBLICATIONS—POSTAGE ON.

The words "regular publications designed primarily for advertising purposes," in the *proviso* of section 14 of the act of March 3, 1879, chap. 180, mean publications chiefly or principally designed for advertising purposes. Whether or not the chief or principal design of any publication is for such purposes, is a question of fact which must be determined by the Postmaster-General in each individual case from the evidence he may be able to obtain.

DEPARTMENT OF JUSTICE,

April 15, 1879.

SIR: Your letter of the 25th ultimo recites the legislation, and the various recent changes therein, in regard to the amount of postage to be charged upon newspapers and periodical publications, and calls my attention to the provisions of the fourteenth section of the act of March 3, 1879.

Your communication submits to me the general question of what constitutes "a regular publication primarily designed for advertising purposes" within the intendment of the statute.

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I fear that I shall not be able to define these terms (which are in themselves simple and intelligible) so as to aid you in the decision of the various questions which are before you as to the character of individual publications.

The difficulties presented seem to me to be entirely as to a question of fact, with which the Postmaster-General must necessarily deal through the information that he receives in each particular case, and those general rules which he may think valuable in deciding such a question.

The section in question provides for the conditions upon which a publication shall be admitted to the second class. After defining that "it must regularly be issued at stated intervals," &c.; that "it must be issued from a known office of publication;" that "it must be formed of printed paper sheets, without board, cloth, leather, or other substantial binding," &c.; that "it must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers," the section proceeds to provide "that nothing herein contained shall be so construed as to admit to the second-class rate regular publications *designed primarily for advertising purposes*, or for free circulation, or for circulation at nominal rates."

The words of the proviso are hardly susceptible of non-construction on account of their simplicity. The only phrase that it seems necessary to comment upon is "designed primarily for advertising purposes." In this connection I think this phrase must be deemed to mean "chiefly or principally intended for advertising purposes." The word "primarily" is intended to indicate the chief or principal object of the publication, and not its first object in any sense of time. The use of the phrase as applied to a publication means one principally intended for advertising purposes, and, by fair inference, not one the design or intention of which is that it should be used incidentally for advertising purposes.

If this be the true construction of the phrase, and I do not doubt that it is, it is necessarily a question of fact in each case whether or not the chief intention of the publication under discussion is for advertising purposes. The intention must be ascertained in each individual case. In ascertaining

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it, it is important to observe that such a publication "must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry," and also have "a legitimate list of subscribers." The fact that it is devoted to literature, science, art, or some special industry, and that it has a legitimate list of subscribers, may exist, and yet it may be one "designed primarily for advertising purposes." If this be the case, it is not entitled to admission into the second class of mail matter.

In the variety of publications which are sent out by mail, that there will be extreme embarrassment in many instances in determining whether the publication is "primarily designed" or chiefly intended for advertising purposes cannot be doubted. There are certain publications which carry upon their face their object, and an inspection would enable it to be determined; but the difficulty arises with that class upon which there is conflicting evidence, certain circumstances indicating an intention to publish a journal valuable for literary or scientific purposes, certain others indicating an intention to employ the same journal for advertising purposes. It is impossible, however, to lay down a rule of law in the matter. The fact must be found by the Postmaster-General from such evidence as he may be able to obtain, connected with his own experience and that of his subordinates, so as to determine in each case whether the publication concerning which the question arises is in the first or second class.

I have carefully read the opinion of the Assistant Attorney-General. I see no reason to dissent from any propositions of law that he advances. Whether or not the suggestions which he makes for deciding each case as a matter of fact are appropriate, my knowledge of the facts and the subject is not sufficient to determine.

Regretting that the question is one in which it is apparent that any legal definition is of so little value, and, therefore, my inability to aid you in the inquiries you must necessarily make upon this subject,

I am, very respectfully, your obedient servant,

CHAS. DEVENS.

HON. DAVID M. KEY,
Postmaster-General.

Improvement of South Pass of the Mississippi.

IMPROVEMENT OF SOUTH PASS OF THE MISSISSIPPI.

By the use of the words "through said jetties," or "through the jetties," in section 9 of the act of March 3, 1879, chap. 181, Congress did not intend to reduce the limit in length of the channel which, under the act of March 3, 1875, chap. 134, it was incumbent upon Mr. Eads to construct between the South Pass and the Gulf of Mexico. Those words refer to the channel embraced in the field of operations at the mouth of the pass, but are not meant to limit the length of the channel to that portion which is included within the walls of the jetties or bounded by either wall. This channel still remains a channel from the South Pass to the Gulf of Mexico.

In considering whether the payments contemplated by the act of March 3, 1879, chap. 181, to be made to Mr. Eads upon his obtaining a channel by the action of the jetties of a particular depth and width, should be made, the Secretary of War is not only to consider whether the channel from the South Pass to the Gulf of Mexico complies with the requirements of that act, but also whether the conditions of the statute in other respects have been complied with (as, for example, those requiring a specific depth, by a certain time, through the shoal at the head of the pass).

DEPARTMENT OF JUSTICE,

April 18, 1879.

SIR: Your letters of the 5th and 8th instant are before me. Deeming that the whole subject of the first is covered by the restatement of the inquiries in your second letter, I confine my answer to that.

On March 3, 1875, the act "making appropriations for the repair, preservation, and completion of certain public works on rivers and harbors, and for other purposes," authorized James B. Eads and his associates to create and permanently maintain "a wide and deep channel between the South Pass of the Mississippi River and the Gulf of Mexico."

In an opinion delivered by my predecessor, the Hon. Alphonso Taft, on January 17, 1877, it was held (I think correctly) that the act was intended to authorize such works as would create and maintain a wide and deep channel between the South Pass of the Mississippi River and the Gulf of Mexico. It contained certain enactments intended to provide also for a navigable depth of water through the said pass, including the shoal at its head.

In 1878 an act was passed substituting for the payments agreed to be made to Mr. Eads by the act of 1875 other pay-

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ments, but not changing the whole amount of the payments to be made for the important work which was entered upon. The act of March 3, 1875, is further modified by section 9 of the river and harbor act approved March 3, 1879. The design of this section is similar. It provides for certain payments to be made to Mr. Eads in lieu of the payments provided by the act of 1875, but does not change the whole amount of the payments. It in no way changes the substitutions made by the act of 1878.

Unless it clearly appears that such was the intention of the section, a construction cannot be given to it which would imply that Congress had changed in any manner its principal original design. It is carefully enacted that the whole of the act of 1875 (except as the same is expressly modified or amended by the section in question, or by other legislation) is to remain in full force, and have the same effect as if such legislation had never been made.

On examining the act, it will be observed that the only modifications expressly made relate to the time of the payments, and the depth and width of the channel in a particular locality.

In, therefore, inquiring whether by the words "through said jetties" or "through the jetties" Congress intended to reduce the limit in length of the channel which under the original act of March 3, 1875, it was incumbent upon Mr. Eads to construct at the South Pass of the Mississippi, the question whether or not there is revealed by this section an intent to change the original design becomes involved.

The paragraphs to which your inquiry relates are:

"When a channel shall have been obtained by the action of the jetties and auxiliary works authorized by said act twenty-five feet in depth, and not less than two hundred feet in width at the bottom, through the said jetties, there shall be paid five hundred thousand dollars."

"When a channel shall have been obtained through the jetties twenty-six feet in depth, and not less than two hundred feet in width at the bottom, there shall be paid five hundred thousand dollars."

When the words "through the jetties" are used in these two paragraphs, they are connected with and governed by

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the words "by the action of the jetties," which apply to a channel contemplated to have been made by their action. This channel is the channel between the South Pass of the Mississippi River and the Gulf of Mexico, and the depth to be obtained is the depth of the channel from the one point to the other. The words "through the jetties" refer to the channel embraced in the field of operations at the mouth of the pass. To limit the length of the channel to that portion thereof between the South Pass and the Gulf of Mexico which is included within the walls of the jetties, or bounded by either wall, would be to invade the contemplated design of a channel from the South Pass entirely to the Gulf of Mexico.

In answer, therefore, to your first inquiry, I am of opinion that by the words "through the said jetties" or "through the jetties" Congress did not intend to reduce the limit in length of the channel which under the original act of March 3, 1875, it was incumbent upon Mr. Eads to construct at the South Pass of the Mississippi, and that this channel still remains a channel from the South Pass to the Gulf of Mexico.

The answer to your first inquiry embraces an answer to the second. The words in question do not furnish any additional criterion in the construction of the previous law.

In view of the letter of the engineer, and other papers which accompanied your communication, I deem it proper in this connection to call your attention to the fact that the payments are not to be made to Mr. Eads solely upon his obtaining the necessary depth and width of channel at the South Pass and from it to the Gulf of Mexico. It will be observed that by the original act the Secretary of War, who was authorized to carry into effect its provisions on behalf of the United States, was also, when said Eads and his associates should from time to time have fulfilled on their part the several foregoing conditions of the act, authorized to draw his warrants, &c., in payment of the amounts promised as they respectively became due by the provisions of the act. (Act of March 3, 1875, section 13.)

On examining the fourth section of the same act it will be seen what some of the "foregoing conditions," as they are termed in section 13, are. This section contains a provision: "*Provided further, That unless the construction of the pro-*

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posed work shall be substantially commenced within eight months from the date of the approval of this act, and prosecuted with due diligence, the provisions contained herein in relation to the said South Pass shall be null and void; and unless the said Eads and his associates shall secure a navigable depth of twenty feet of water through said pass within thirty months after the date of the approval of this act, Congress may revoke the privileges herein granted in relation to the said South Pass, and cancel the obligations herein assumed by the United States. And Congress may revoke the privileges herein granted in relation to the said South Pass, and cancel the obligations herein assumed by the United States, unless the said Eads and his associates shall, after securing twenty feet of water, secure an additional depth of not less than two feet during each succeeding year thereafter, until twenty-six feet shall have been secured; and in case said Eads and his associates shall fail to comply with the foregoing conditions, as to depth of water, and time, for any period of twelve months in excess of the time fixed, as aforesaid, then the privileges herein granted, and the obligations herein assumed in relation to the said South Pass, shall absolutely become absolutely null and void without action by Congress."

These conditions not only provide for the contingency upon which Congress may by its action revoke and declare void the contract with Eads, but also constitute obligations which he assumes in entering upon the work. By the words "through said pass" these conditions apply to the channel through the pass properly so called, and to the channel through its head, which is brought within the necessary limits of the improvement. This channel through the shoal at its head and through the pass itself is to have a navigable depth by a certain time of 20 feet, and annually thereafter an additional depth of 2 feet, until a navigable depth of 26 feet is secured. No specific width of channel is required by the act, but a navigable width as to depth is clearly implied. (Opinion of Attorney-General Taft, dated January 17, 1877, 15 Opin., 183.)

In considering, therefore, whether the payments contemplated by the act of March 3, 1879, to be made to Mr. Eads

Indian Deed—Approval of, by the President.

upon his obtaining a channel by the action of the jetties of a particular depth and width, should be made, the Secretary of War is not only to consider whether the channel from the South Pass to the Gulf of Mexico complies with the requirements of the act, but also whether the conditions of the act in other respects have been complied with.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. GEORGE W. MCCRARY,

Secretary of War.

INDIAN DEED—APPROVAL OF, BY THE PRESIDENT.

The case of a proposed deed by one Pe-wo-mo, a Pottawatomie Indian, covering part of the tract reserved to Billy Caldwell (under whom the said Indian claimed title by inheritance) by the treaty of July 29, 1829, with the Chippewa, Ottawa, and Pottawatomie Indians, considered in connection with an application to the President for his approval of the deed; and also certain inquiries, viz, as to the right of Pe-wo-mo in the premises, the execution of the papers, and the authority of the President to approve the deed, answered.

DEPARTMENT OF JUSTICE,

April 24, 1879.

SIR: On March 13, 1879, I received from you papers in regard to a certain proposed deed of one Pe-wo-mo, a Pottawatomie Indian, with a memorandum of certain questions upon which you desired my opinion:

1. Has Pe-wo-mo authority to convey the property?

In regard to this question, I would say that, upon the *ex parte* affidavits and other evidence among the papers, Pe-wo-mo has apparently a title to the property. It is not free from doubt, however, or question, because it would seem that there are, or may be, other claims upon it. It would therefore be impossible to express a decided opinion as to what would be the result of a judicial investigation of the title.

In regard to this matter, I would suggest that this is rather a question for the person who receives the deed than for the President. The deed itself purports only to be a quitclaim; and the proposed approval of the President in no manner would assume to certify, far less guarantee, the title.

Indian Deed—Approval of, by the President.

In reference to a similar deed, it was held that where President Van Buren had approved one executed by a person purporting to be a certain Indian, but who was not in fact the person owning the title, President Pierce might afterwards approve a new deed, executed by the party properly having the title. (6 Opin., 711.)

2. Are the papers properly executed ?

To this I would reply that I see no reason why the papers are not in proper form.

3. Has the President authority to approve the deed ?

I reply that, under article 4 of a treaty made July 29, 1829, between the United States and the United Nations of Chippewa, Ottawa, and Pottawatomie Indians, the lands granted to certain Indians named, of whom the alleged ancestor of Pe-wo-mo (namely, "Billy Caldwell") is one, are forbidden to be conveyed by the grantees, or their heirs, without the permission of the President. This, by clear implication, gives authority to the President to approve the deed.

In addition to the questions suggested, as the power to be exercised by the President is the delicate one of "guardianship," I would suggest inquiry as to whether the consideration proposed in the deed is sufficient. It is \$2,000. The sum for which the same tracts were assessed in 1878 was \$2,392.78. As farming lands are generally assessed at considerably less than their value (probably not more than two-thirds), it would seem that these tracts, according to such assessment, were worth something over \$3,500.

In order to investigate the price of land, I have communicated with the United States attorney at Chicago, and I inclose a copy of his reply. It will be seen that his estimate (so far as he has been able to make one, after inquiry among real estate dealers) would place the value of the land even higher than the sum I have named.

It will be, of course, for the President to consider whether, on the evidence before him, he can properly approve the conveyance for the price named in the deed. Much, obviously, must depend upon what is known of the grantor himself. If he be a thoroughly intelligent person, and acquainted with the value of the property, perhaps his own estimate would be better than that of the assessor, or of real estate dealers, even if it be less in amount.

Case of Paymaster Bellows.

In the earlier part of this opinion I suggested that while there was an apparent title in Pe-wo-mo, it was still affected by adverse claims. These arise under tax-sales. Perhaps this fact would render the sum proposed to be given a reasonable compensation for the land.

In regard to the approval of the President, it will be sufficiently signified by writing the word "Approved," with the date of the approval, and by the affixing of his signature.

Very respectfully, your obedient servant,

CHAS. DEVENS.

The PRESIDENT.

CASE OF PAYMASTER BELLOWES.

B., a paymaster in the Navy, was tried and convicted by a naval general court-martial, convened on board the U. S. S. Pawnee, at Montevideo, Uruguay, in November, 1868, under an order of Rear-Admiral C. H. Davis, commanding the South Atlantic Squadron, and was sentenced (*inter alia*) to be dismissed from the naval service. The record of the proceedings was received at the Navy Department with the following, signed by Rear-Admiral Davis, indorsed thereon: "Respectfully forwarded, with the remark that the finding of the court is not sustained by the evidence, which fails to show that the accused received from the bank the amount of money he is charged with having received." *Held* that the action of the officer who ordered the court (Rear-Admiral Davis), in forwarding the proceedings with that indorsement thereon, cannot be deemed to be a disapproval of the sentence of the court. Such disapproval should be distinctly expressed.

On the 28th of January, 1869, the Secretary of the Navy addressed a letter to B, as follows: "In consequence of the facts appearing upon the record of the naval general court-martial before which you were tried, November 16, 1868, on board the U. S. S. Pawnee, at Montevideo, Uruguay, you are dismissed the naval service, and will from this date cease to be regarded as an officer in the United States Navy." *Held* that this must be regarded as a dismissal by reason of the disclosures in the record (which dismissal the Executive had then no power to make), and not as an approval and execution of the sentence.

DEPARTMENT OF JUSTICE,

April 30, 1879.

SIR: Your letter of the 3d instant submits to me certain questions in regard to the case of Edward Bellows, late a paymaster in the Navy, which arise upon the following state of facts:

Mr. Bellows was tried by a general court-martial, convened

Case of Paymaster Bellows.

under an order of Rear-Admiral C. H. Davis, U. S. N., on board the U. S. S. Pawnee, at Montevideo, Uruguay, on the 7th of November, 1868, found guilty of the charge (substantially of embezzlement) preferred against him, and sentenced "to make good to the United States Government the amount of money, \$909.60, of which the said Government was defrauded by him, and to be dismissed from the naval service of the United States."

The record of the proceedings in the case was received at the Navy Department bearing the following indorsement of the officer ordering the court:

"Respectfully forwarded with the remark that the finding of the court is not sustained by the evidence, which fails to show that the accused received from the bank the amount of money he is charged with having received.

"C. H. DAVIS,

"Rear-Admiral Commanding South Atlantic Squadron."

On the 28th of January, 1869, the Secretary of the Navy addressed the following letter to Mr. Bellows:

"NAVY DEPARTMENT,

"January 28, 1869.

"SIR: In consequence of the facts appearing upon the record of the naval general court-martial before which you were tried, November 16, 1868, on board the U. S. S. Pawnee, at Montevideo, Uruguay, you are dismissed the naval service, and will from this date cease to be regarded as an officer in the United States Navy.

"Respectfully,

"G. WELLES,

"Secretary of Navy."

Paymaster EDWARD BELLOWS, U. S. N.,

No. 59 East Twentieth Street, New York.

Your inquiries are—

1. "Whether the action of Rear-Admiral Davis, as indorsed upon the record, is a disapproval of the finding and sentence in the case?"

To this I reply, that I do not consider that this action of Admiral Davis can be held to be a disapproval of the finding and sentence. While, if he had disapproved such finding

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and sentence it would have been his duty to have forwarded the proceedings to the Navy Department, it would have been so for the purpose of information and record only. When, however, he simply forwards the proceedings (although he accompanies this act with a statement that the evidence fails to show that "the accused received from the bank the amount of money he is charged with having received") this cannot be construed as a disapproval of the finding and sentence, although it was intended undoubtedly to call to the attention of the Department what he deemed to be a failure in the evidence. While an officer convening a court-martial may not have the power to confirm and execute the sentence, he has still absolute power to disapprove and annul it, but this disapprobation and annulment should be distinctly expressed. It cannot be expressed by a reference of the sentence to the superior power. It is, undoubtedly, the proper practice for the officer, in transmitting the proceedings to the authority having the power to execute the sentence, to subscribe a formal approval of the same, if he does not disapprove of it; but the failure to state such approval cannot be construed as a disapproval of the charges. I understand the section 267 of the "Navy Regulations of 1870" (which were not in force at the time of these proceedings) to be declaratory of the law as it existed previous to those regulations.

2. Your second inquiry is upon the hypothesis that the action of the admiral may be construed as a disapproval of the proceedings, and therefore the answer to it is necessarily included in what I have already said.

3. Your third inquiry is, "as to the legality of the order of the Secretary of the Navy of January 28, 1869, dismissing Paymaster Bellows from the Navy."

Without discussing the question of whether or not the Secretary of the Navy may properly authenticate the act of the President in carrying into effect the sentence of a court-martial by dismissing an officer from the Navy in accordance with such sentence, it is to be remarked that the letter of the Secretary of the Navy does not profess in direct terms (nor do I think it does inferentially) to be the act of approval of the sentence of the court-martial. It states that "in consequence of the facts appearing upon the record," &c., Mr. Bel

Duty on Steel Wire.

lows is dismissed from the naval service; but it makes no allusion to, and no recognition of, the sentence of the court-martial. It is founded upon the facts disclosed by the record, and does not state the act which the Secretary does to be the act of approval of the sentence. Its fair construction is that it is a dismissal from the service by reason of the disclosures made by the record.

Previous to the passage of the act of July 13, 1866 (14 Stat., 92; Rev. Stat., sec. 1624, art. 36), the President would have been authorized thus to dismiss an officer of the Navy upon any cause which seemed sufficient to him.

The language of the letter of the Secretary indicates an intent to exercise the power of dismissal which did not then exist, and not an intent to approve, and direct to be carried into execution, the sentence of the court-martial.

I return the papers submitted by you.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. R. W. THOMPSON,

Secretary of the Navy.

NOTE.—In connection with the subject of the first inquiry discussed in the foregoing opinion, compare Winthrop's Digest, page 435, paragraph 2. This work is a valuable compendium of law relating to the military service as expounded and administered in the practice of the Government.

DUTY ON STEEL WIRE.

Section 2504, schedule E, Rev. Stat., providing for steel in coils, does not refer solely to the *form* in which the merchandise is imported, but is to be construed in connection with the commercial designation of the article.

Under that schedule (which provides that "all articles of steel partially manufactured, or of which steel shall be a component part, not otherwise provided for, shall pay the same rate of duty as if wholly manufactured") steel wire partially manufactured should pay the same rate of duty as steel wire wholly manufactured.

DEPARTMENT OF JUSTICE,

April 30, 1879.

SIR: Yours of the 22d ultimo, as modified by letter of 15th instant, requests my opinion upon these two questions:

"First. Whether the statute (Rev. Stat., p. 466, Title

Duty on Steel Wire.

XXXIII, section 2504, schedule E, 'Metals') providing for steel in coils has reference solely to the *form* in which the merchandise is imported, or is to be construed in connection with the commercial designation of the article.

"Second. Whether, if it be assumed that this merchandise is steel wire, partially manufactured, it should under the provisions of schedule E, for all articles of steel partially manufactured and not otherwise provided for, pay the same rate of duty as if wholly manufactured, and be classified as assimilating to steel wire."

1. The Supreme Court of the United States, in a decision rendered a year ago (*Arthur v. Morrison*, 96 U. S., 108), authoritatively determined that, in passing the tariff act of June 30, 1864—in which the word "coils," as applicable to an importation of steel, first appears—Congress intended to impose duties upon imported articles according to their commercial designation. This rule had long been applied, in numberless instances, under precedent legislation. It is properly as applicable to manufactures of steel as to those of silk or of other material. Evidently, *everything* made of steel, coiled for convenient transportation, is not covered by this phrase "steel in coils"; because wire is so prepared for shipment; and this article is specifically enumerated in the section and schedule under consideration, in and immediately after the clause relating to steel in ingots, bars, coils, sheets, and steel wire, &c.

In my opinion, reference is not to be had "*solely to the form* in which the merchandise is imported," but it "is to be construed in connection with the commercial designation of the articles."

2. Your second inquiry in proposing a question of law properly states or assumes the fact upon which the legal question arises. Counsel for the importers have strenuously urged that your assumption is erroneous; but as to this I have no occasion to form any judgment, as questions of fact are not for my determination. It is my opinion that *if* "this merchandise is steel wire partially manufactured it *should*, under the provisions of schedule E, for all articles of steel partially manufactured, pay the same rate of duty as if wholly manufactured, and be classified as assimilating to steel wire."

 Claims under Treaty of 1819 with Spain.

The twenty-seven inclosures transmitted with yours are herewith returned.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. JOHN SHERMAN,
Secretary of the Treasury.

 CLAIMS UNDER TREATY OF 1819 WITH SPAIN.

Opinion of November 8, 1878, namely, that the President cannot interfere to change the action of the Secretary of the Treasury upon the decisions of the judges under the ninth article of the treaty with Spain of February 22, 1819, for the reason that the acts of March 3, 1823, chap. 35, and June 26, 1834, chap. 87, provide an appeal from the judges' decisions to the Secretary of the Treasury and to that officer only, reaffirmed.

Where a statute imposes a particular duty upon an executive officer, and he has acted (performed the duty according to his understanding of the statute), there is no appeal from his action to the President or to any other executive officer, unless such appeal is provided for by law.

Certain questions touching the duties and proceedings of the judges in regard to claims under said treaty, and the powers and action of the Secretary of the Treasury relating to the same claims, &c., considered and answered; and upon view of the whole matter, *held* that those claims have been more than a quarter of a century settled and determined so far as they can be by the Executive Department of the Government.

DEPARTMENT OF JUSTICE,
 May 2, 1879.

SIR: I have again considered the case of the claimants under the ninth article of the treaty of 1819 with Spain, upon questions submitted in a brief of Messrs. Chas. B. Collin and F. Cuppy, of counsel for the claimants, upon which brief I find inclosed by the President a request that I will give my opinion on the points made therein.

The purpose of the brief and of the memorial which it supports is to make it apparent to the President that it is his duty to direct the Secretary of the Treasury to reopen and reconsider the case of the claimants aforesaid. The main proposition and the only one which affects the President, I take from page 5 of the brief.

It is as follows:

"That it is not only within the authority, but it is the duty of the Executive to direct a reopening and reconsideration of

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the cases by the Secretary of the Treasury under the treaty and international law."

In an opinion rendered to the President November 8, 1878, I recited the paragraph of the treaty on which the cases depend, referred to the laws passed by Congress to carry the treaty into effect, stated what had been the decision of the judges in Florida and of the Secretary under these laws in respect to the allowance of interest upon the claims, and arrived at this conclusion, viz, that the President could not interpose to change the uniform action of successive Secretaries of the Treasury upon the reports of the judges, for the reason that the acts of Congress cited provide an appeal from the judges' decisions to the Secretary of the Treasury, and to that officer only.

I adhere to this opinion. It is grounded in principle, and is supported by the best authority. It is a well-established proposition that where the laws impose upon a particular executive officer a duty, and he has acted—has performed the duty according to his understanding of the law—there is no right of appeal from his decisions to the President, or any other executive officer, unless such appeal is expressly provided for by law.

In Wheaton's case (1 Opin. Atty. Gen., 624), Wirt, Attorney-General, treats the subject fully and with signal ability. He says (p. 625): "The Constitution assigns to Congress the power of designating the duties of particular officers; the President is only required to take care that they execute them faithfully," that is (as he explains further on page 626), *honestly*, not with perfect correctness of judgment, but *honestly*." If they have done so "the President (says Mr. Wirt) has no authority to interfere." (Page 628.) He refers to and reaffirms this opinion on pages 637, 679-80, 705, and 706, same volume. To the same effect are the opinions of Taney, Attorney-General, (2 Opin. in Grice's case, on pages 481-2, in the case of General Taylor, page 508, and in Hogan's case, page 544). See also the opinion of Attorney-General Crittenden (5 Opin., 630, 635).

These are cases arising upon decisions of the accounting officers. The same rule has been applied to the decisions of other executive officers. In 1850 an attempt was made to

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appeal from a decision of a former Secretary of the Treasury concerning the extent of the grant of land on the Des Moines River to Iowa; also the aid of the Executive was invoked to compel the Secretary of War to do a certain act, which was within his province and discretion, and which he had refused to do. These cases together were referred by the President to Attorney-General Crittenden. In his opinion (rendered December 2, 1850, 5 Opin., 275) Mr. Crittenden says: "Neither the act of Congress in the one case, nor the contract in the other, makes any reference or delegation of authority to the President respecting any of the matters now brought before him." "To other functionaries of the Government the settlement of all these matters of controversy seems to me more properly to belong. * * * The interference of the President with the performance of the particular duties assigned by law to subordinate officers, either on the ground of correcting errors or supplying omissions, would, in the general, be exceedingly injudicious, *if at all warrantable.*" He concludes with this opinion and advice to the President, "that he is under no official obligation to interfere and *ought not* to interfere in either of the two cases."

Again, under an act of March 3, 1857 (11 Stats., 200), the Commissioner of the General Land Office was required to state an account between the United States and the State of Illinois upon what was known as the "two per cent." fund. The officer disallowed the claim of the State, to have either payment or accounting. The question then was, whether an appeal could be taken to the President. Attorney-General Bates (March 8, 1864) was "clearly of opinion that no such appeal lies." He refers to the numerous opinions of his predecessors, and says the doctrines are fully settled *for this office.* (11 Opin., 14.)

I will cite but one more authority.

The case of *The United States v. Ferreira* (13 Howard, 40) came before the Supreme Court at its December term, 1851. It was an appeal from the decision of the district judge of the northern district of Florida upon one of these very claims under the treaty of 1819. It was held, Chief Justice Taney delivering the judgment of the court, that the function of the judges was not a judicial one—that the authority conferred

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on them was nothing more than that of commissioners to adjust certain claims against the United States, and that their decisions were not judgments but only awards of commissioners; that the power of *revision* and *control* over these awards was given to the Secretary of the Treasury, and properly so under the treaty, and that "his decision against the claimant for the whole or a part of the claim as allowed by the judge is *final* and *conclusive*. It cannot afterwards be disturbed by an appeal to this or any other court, *or in any other way, without the authority of an act of Congress.*" In other words, the law having imposed upon the Secretary, and upon him alone, the duty of reviewing the proceedings of the judge, his (the Secretary's) decision is an end of the matter.

Upon this point nothing further need be added, and I again most respectfully submit to the President that it falls neither within the sphere of his official duty nor of his authority to give any direction to the Secretary of the Treasury in these cases.

Other "points made" by the counsel I will notice in answering the interrogations put to me at the close of their brief.

The first interrogatory is as follows:

First question. In so "adjusting," "adjudging," or "adjudicating" the claims, were the judges bound to observe the rule of damages as prescribed by the courts and by the rules of international law in like cases, or were they to be governed by the custom or "usage" of the Treasury Department?

Answer. In assessing damages the judges were bound to follow the rule of law which in their opinion was applicable to each case, as it appeared in testimony.

In passing upon the cases submitted to them they were bound to act independently within the sphere of their authority; and as it would have been manifestly improper *then* for the President or his legal adviser to thrust upon them any advice or opinion as to the law by which they should be governed in making up their decisions; so *now*, as there is no appeal to the President from these decisions he cannot properly be called upon to point out the exact rule by which they should have been governed.

Second question. If the judges were bound to observe the

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established principles of law in like cases, did they, *in fact*, do so? In other words, were their awards "just and equitable within the provisions of the treaty"?

Answer. It is to be presumed that the judges in adjusting the claims acted honestly upon their view of the law; whether their awards were or were not just and equitable within the provisions of the treaty, is a question left by the acts of 1823 and 1834 to the Secretary of the Treasury, and to no other officer of the Government.

In respect to this interrogatory it is obvious to remark, that by it the Attorney-General is asked to review decisions where no records of the evidence or of the questions of law raised upon the hearing of the cases are before him, thus making an officer to whom the law assigns no duty in the premises a sort of appellate court without the means of knowledge of the matter he is called to pass upon.

I most respectfully submit that the Attorney-General cannot properly be asked to review the findings of the judges, and to say whether they are just and equitable, or otherwise, as his opinion upon the point can have no legal relation to the matter, and is therefore wholly immaterial. The question is left by the statute solely to the conscience and judgment of the Secretary of the Treasury.

Third question. In determining whether the decisions were "just and equitable within the provisions of the treaty," as provided in the act of 1823 (assuming that this extended to a determination of the *amount*), what was the *test* or *standard* operative upon the Secretary, under the treaty and act passed to carry it into effect? Was it the *usage*, *custom*, or *practice* of the Department, or the obligations arising under the treaty, interpreted by the international law?

Answer. Though no authenticated copy of the original order of Secretary Woodbury is before me, yet, from seeing it often quoted in documents and opinions connected with the case, I am warranted in saying that the test or standard adopted by him first, and afterwards by his successors, was the "usage" of the Treasury Department, but whether or not they considered this usage in harmony with the requirements of international law, I do not know.

Fourth question. Assuming as matter of fact that no Secre-

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tary has ever yet decided that the judicial decisions were not "just and equitable within the provisions of the treaty," but have simply decided that they could not pay the awards under the "usage" of the Department, do not the cases, in fact, yet remain open in legal contemplation?

Answer. No. The cases have been finally decided by the tribunal of last resort, but it is a question for the Secretary of the Treasury.

Fifth question. Assuming as matter of fact that Congress has, since the decisions of the Secretaries, by reports of committees and otherwise, expressed opinions at variance with those of the Secretaries in the premises, and affirming the duty of the Secretary, under the treaty and laws passed to carry it into effect, to pay the full amount awarded by the judges, does not this render it proper that the cases should be reopened and reconsidered at the Treasury Department, notwithstanding a change of administration?

Answer. No. If it was the settled opinion of Congress that the ruling of the Secretaries was wrong, there was an obvious way to alter it, viz, by express enactment.

After the rule of decision had become known and established, the failure of Congress to interpose, by statute, to change it, might well have been taken by the Secretaries as evidence that the laws of 1823 and 1834 had been administered according to their true intent.

But Congress has not left the matter to inference and conjecture. Mr. Attorney-General Cushing, in his opinion published in the sixth volume of Opinions, pages 548 and 549, shows that by repeated acts, one as late as 1853, Congress has recognized and affirmed the action of the Secretaries.

Sixth question. Under the ninth article of the treaty of 1819 with Spain, and the acts of Congress passed to carry it into effect, were the judges therein named authorized to bind the Government of the United States by their award to any extent? If so, in what respects and to what extent?

Answer. The United States were not bound by the decision of the judges to any extent, unless they were approved by the Secretary of the Treasury.

Seventh question. Had the Secretary of the Treasury dis-

Claims under Treaty of 1819 with Spain.

cretionary authority to reject such awards? If so, on what grounds?

Answer. He had authority to reject the awards in whole or in part, if upon review he found them in any respect not just and equitable. The power is conferred upon him by the act of 1823. (*United States v. Ferreira*, supra.) See also opinions of Attorneys-General Crittenden (rendered to Hon. Thomas Ewing, Secretary of the Treasury, June 17, 1841, 3 Opin., 635); Legare (to Hon. Walter Forward, Secretary of the Treasury, October 25, 1841, 3 Opin., 677); Nelson (to Hon. J. C. Spencer, Secretary of the Treasury, December 9, 1843, 4 Opin., 286); Crittenden, second opinion (to Graham, Acting Secretary, April 16, 1851, 5 Opin., 333); Cushing (to Guthrie, Secretary of the Treasury, June 9, 1854, 6 Opin., 533).

Eighth question. Were the decisions of the judicial officers named in the acts of Congress binding on the claimants, so as to be a satisfaction of the treaty obligation to *Spain*? If so, on what principle? If binding on claimants when claims were rejected or reduced, were such decisions not binding on the *United States* when finding an award in favor of a claimant; and, if not, what is the ground of difference?

Answer. To the first branch of the question, they were, because the legislative power has so ordained. To the second, no, for the same reason. The judges derived all their authority from the acts of Congress, not from the treaty, and Congress had the right to regulate their proceedings and limit their power. (*United States v. Ferreira*, supra.) Congress had a right to make the approval of the award by the Secretary of the Treasury a condition of the liability of the Government to pay it. *Ibid.*

Ninth question. Did the discretionary authority of the Secretary of the Treasury rightfully extend to an inquiry into the *amount* of the award, the reasonableness of the sum found due, or the principle assumed in the measurement of damages, or in ascertaining the value of the property destroyed; and was not the Secretary of the Treasury limited by the treaty and the laws in pursuance thereof to the single inquiry, whether the case presented for adjudication to the judges named was *in its nature* within the class of those intended by the treaty to be provided for?

Claims under Treaty of 1819 with Spain.

Answer. To the first branch I return an affirmative answer; to the second, a negative one. I forbear to answer more at length, but see authorities cited *supra*.

Tenth question. If, under the treaty and laws passed to carry it into effect, the Secretary had authority to inquire into the justice of the *amount* awarded by the judges, was he to be guided in such inquiry by the same rules and principles as were operative upon the judges; or, in other words, do the treaty and laws passed to carry it into effect provide for *two* standards of measuring the "satisfaction" stipulated to be made: *one* operative on the judges, and *another*, and different standard, operative on the Secretary?

Answer. The Secretary of the Treasury upon appeal from the judges was to be guided by those rules and principles of law which, in his judgment, were rightly applicable to the cases. There were not two standards of measuring the satisfaction provided by the treaty. Neither the treaty nor the statutes fixed a standard of measurement, but the acts of Congress made the Secretary the final arbiter, and his decision is an end of the cases.

In conclusion I desire to say, that all the positions taken by the memorialists and their counsel, except perhaps that relating to the power of the President, have been most elaborately and thoroughly considered by my predecessors, Messrs. Legare, Nelson, Crittenden, and Cushing, in opinions which I have cited. They have uniformly reached conclusions similar to those stated above. They have exhausted the subject. The Florida claims cases are, in my opinion, and have been for more than a quarter of a century, settled and determined, so far as they can be by the Executive Department of the Government. There is not (to use the language of Mr. Cushing), in the history of the Government, a stronger and clearer case than this of *res adjudicata* both in opinion and action. If former Secretaries of the Treasury have erred in their rulings, their errors are reparable only by an appeal to Congress.

Very respectfully, your obedient servant,

CHAS. DEVENS.

The PRESIDENT.

Deed of Indian.

DEED OF INDIAN.

Proposed deed of Pe-wo-mo, a Pottawatomie Indian, granting certain land near Chicago, Ill., considered with reference to objections suggested by the Commissioner of Indian Affairs. *Advised* that the President, when satisfied that the consideration is a fair one, should approve the deed and transmit it to the Indian Bureau with directions that the Commissioner deliver the same upon satisfactory evidence that the consideration has been either paid or secured to the Indian.

DEPARTMENT OF JUSTICE,

May 10, 1879.

SIR: I have carefully read the communication of the Commissioner of Indian Affairs concerning a proposed deed of Pe-wo-mo, a Pottawatomie Indian, of certain land in the vicinity of Chicago.

1. The first objection suggested by the Commissioner is that the files of his office show that one Pe-y-mo (apparently the same person) executed a deed to the same tract on March 28, 1873.

As this deed does not appear to have been approved by the President, it could not operate to convey the lands in question; and it is fairly to be presumed, as that deed in its present shape is inoperative, that the proposed conveyance is one in lieu of it.

2. The acknowledgment of the grantor is not at present attached to the deed.

This circumstance, from inspection of the papers, is accidental. It was attached to the deed at the time the papers were first laid before the Department, and was separated from it with some other papers in order that the deed and the plan which accompanied it might be sent to the district attorney at Chicago for his examination into the value of the land so far as he was able.

3. The other suggestions of the Commissioner are, substantially, that the grantor does not speak the English language; that the grantee was an Indian agent; that parties have heretofore procured deeds from Pottawatomie Indians without paying the consideration; that the evidence inclosed in the letter is not sufficient proof that the consideration expressed in the deed was a fair price for the land, or that the consideration was actually paid to the grantor.

Purchase of Land.

In regard to these suggestions, I would observe that I heretofore called the attention of the President to the fact that, if possible, a more thorough inquiry should be made to ascertain if the consideration was a fair one. I think the suggestion of the Commissioner also, that the consideration, if ascertained to be fair, should be paid or secured to the Indian, is a highly proper one.

I can suggest no more convenient mode of dealing with the matter than that the President, when satisfied that the consideration is a fair one, should approve the deed and transmit it to the Indian Bureau, with directions that it might deliver the same upon satisfactory evidence that the consideration had been either paid or secured to the Indian.

In reference to the whole matter, it would seem that if Pe-wo-mo has a title (which it seems to me he has, although it is difficult to express a decided opinion in advance of adjudication of the matter) he ought to be entitled to convey it, and to receive the value of it. If he has not a title, those persons to whom he conveys purchase clearly with their eyes open, having their attention called to all the difficulties which accompany it.

If the deed itself is not executed in compliance with the rules prescribed by the Department, it is still sufficient in law to convey the title, and this objection is one that is not important so far as the interests of Pe-wo-mo are concerned, who is the only person for whom the President is bound to assume any guardianship in the matter.

Very respectfully, your obedient servant,

CHAS. DEVENS.

The PRESIDENT.

PURCHASE OF LAND.

The discretion given by the act of May 21, 1872, chap., 88, to acquire, either by purchase or by condemnation, a lot of ground in the city of Fall River, Mass., suitable for a site for a public building, does not extend to the acquisition of "adjoining land" referred to in the act of March 3, 1879, chap. 182. The authority to "purchase" given by the latter act does not include authority to acquire by condemnation.

Generally, in statutes as in common use, the word "purchase" is em-

Purchase of Land.

ployed in a sense not technical, only as meaning acquisition by agreement with and conveyance from the owner, without governmental interference.

DEPARTMENT OF JUSTICE,
May 14, 1879.

SIR: Your letter of the 21st of March last calls my attention to the act of May 21, 1872 (17 Stat., 140), which authorized the "purchase at private sale, or by condemnation, in pursuance of the statutes of the State of Massachusetts," of a lot of ground in the city of Fall River, Mass., suitable for a site for a public building in that city, and made an appropriation for that purpose; to the act of March 3, 1873 (17 Stat., 523), which authorized the "purchase" of additional ground at same place, for the same object, and made an appropriation therefor; and to the act of March 3, 1879, entitled "An act making appropriations for sundry civil expenses of the Government," &c., authorizing the "purchase" of a certain piece of ground, which adjoins said site, and appropriating \$25,000 for such purchase.

Under the acts of May 21, 1872, and March 3, 1873, land was acquired for the purpose therein mentioned by purchase from the Pocasset Manufacturing Company. This company owns the piece of ground authorized to be purchased by the act of March 3, 1879, but asks for it a price which is more than twofold the amount appropriated by that act for its purchase, and which, from estimates submitted to your Department, is regarded as about five times its value. In view of these facts, you inquire, "Whether under existing law the United States can proceed to acquire title to this property by condemnation, either under the original act authorizing the purchase of a site by private sale or condemnation, or in accordance with the laws of the State of Massachusetts."

I am unable to find any provision in the laws of Massachusetts authorizing the acquisition of the title in this case by condemnation. As to the acts of Congress above cited, it is to be observed that while the act of May 21, 1872, confers upon the Secretary of the Treasury a discretionary power either "to purchase at private sale or by condemnation" a lot of ground suitable for a site, &c., the two acts of March 3, 1873, and March 3, 1879, provide simply for the "purchase".

Site for Movable Beacon.

of additional ground for a site and of adjoining land. The discretionary power given by the act of 1872 must be deemed to be limited to the acquisition of the lot of ground thereby authorized to be acquired as a site for the public building; it does not extend to the acquisition of the "adjoining land" referred to in the act of 1879, the title to which is to be acquired solely by virtue of the authority conferred by the latter act. The authority given by this act is to "purchase" the property in question. Although, technically, purchase includes all modes of acquisition other than that of descent, yet generally, in statutes as in common use, the word is employed in a sense not technical, only as meaning acquisition by agreement with and conveyance from the owner, without governmental interference. (91 U. S. Rep., 374.) I do not think that the authority to purchase given by the act of 1879 should be taken to include authority to acquire by condemnation.

To your inquiry I accordingly reply that, in my opinion, title to the property referred to cannot be acquired by condemnation, either under the existing laws of the United States or those of Massachusetts.

I am, sir, very respectfully,

CHAS. DEVENS.

Hon. JOHN SHERMAN,

Secretary of the Treasury.

SITE FOR MOVABLE BEACON.

The provisions of section 4661, Rev. Stat., viz., that "no light-house, beacon, public piers, or land-mark shall be built or erected on any site until cession of jurisdiction over the same has been made to the United States," do not apply to a movable beacon or bug-light, which is not designed to be permanently fixed in any one place, but whose location is contemplated to be changed on the beach from time to time according to circumstances, these changes extending over a distance of half a mile. Those provisions are only intended to include structures whose location is of a fixed and permanent character.

In acquiring a site for such movable beacon or bug-light, under the appropriation made therefor by the act of March 3, 1879, chap. 182, the

Site for Movable Beacon.

purchase from the owner of the beach of a perpetual right to occupy such parts thereof for that purpose as circumstances may from time to time require, is sufficient.

DEPARTMENT OF JUSTICE,
May 16, 1879.

SIR: Your letter of the 31st of March last inclosing a communication from the chairman of the Light-House Board in regard to the movable beacon at Ipswich, Mass., submits certain inquiries respecting the purchase of a site for this beacon, for which an appropriation is made by the act of March 3, 1879, entitled "An act making appropriations for sundry civil expenses," &c.

It appears by the communication mentioned that the beacon referred to in your letter is what is known as a bug-light, having no permanent position, but is moved on the beach from time to time over a distance of about half a mile to correspond with the changes in the bar, and has never been located on government land.

The owner of the beach having proposed to sell to the United States a perpetual right to occupy such parts thereof for sites for the beacon as circumstances may from time to time require, it is inquired whether section 4661, Revised Statutes, which provides that "no light-house, beacon, public piers, or landmark shall be built or erected on any site until cession of jurisdiction over the same has been made to the United States," applies to a movable structure like the beacon in question, which is not designed to be permanently fixed in any one place, but whose location is contemplated to be changed from place to place according to circumstances, and whether the purchase of such a right in the soil as the owner proposes to sell can properly be made from the appropriation provided by the aforesaid act.

Section 4661 covers certain structures, including a beacon, "built or erected on any site." These terms indicate that its provisions are only intended to include structures whose location is of a fixed and permanent character—the site, in contemplation of the statute, being inseparably connected with the structure after its erection thereon, and the area or limits of the former being at all times capable of definite and precise ascertainment, to the end that the place embraced in the ces-

Specific Disabilities in Pension Cases.

sion of jurisdiction required by that section may with certainty be known. A structure whose location does not have, and is not designed to have, this fixed and permanent character, but is made movable in order that it may be taken from place to place to fulfill its purposes, cannot be said to be built or erected on any site thus capable of being at all times definitely ascertained.

As the beacon in question has no permanent location, but its position and situation on the beach are changed as circumstances require, these changes of location extending over a distance of about half a mile, such a right as the owner of the beach proposes to sell to the United States would seem to be appropriate for the purpose of its maintenance. In making provision for "purchasing a site" for this beacon, it was probably not contemplated that the absolute title to an area so extensive as that required for its changeable location should be acquired. The object of the provision will, I think, be fully met by acquiring from the owner a perpetual right to use such parts of the premises as a site for the beacon as its purposes and circumstances may from time to time require.

I am accordingly of the opinion that the provisions of section 4661 do not apply to a beacon such as the one under consideration, and that the purchase of a perpetual right such as the owner of the beach proposes to sell may properly be made from the appropriation referred to.

I am, sir, very respectfully,

CHAS. DEVENS.

Hon. JOHN SHERMAN,

Secretary of the Treasury.

SPECIFIC DISABILITIES IN PENSION CASES.

In March, 1865, a soldier received in battle a gunshot wound in the arm, resulting in the partial disability thereof. On October 3, 1867, an examining surgeon found that the injury to the arm occasioned the loss of fourteen-eighteenhs of its original vigor, and therefore certified that the soldier was unable to do any manual labor. Held that the disability in this case was not "specific" within the meaning of section 469c½, Revised Statutes, and that no increase of pension was allowable to the soldier in respect of such disability, commencing prior to the date of the examining surgeon's certificate.

Specific Disabilities in Pension Cases.

The terms "specific disabilities," as used in that section, signify those disabilities which are *specified* in the pension laws—such as the loss of a hand, foot, or eye. Injuries requiring medical examination to ascertain and declare their nature and extent, and as to the effect of which there is room for difference of opinion, are not comprehended thereby.

DEPARTMENT OF JUSTICE,

May 17, 1879.

SIR: Yours of 29th March last states, substantially, that on the 8th day of March, 1865, in battle at Kingston, N. C., Henry Hutchinson received two gunshot wounds, one resulting in the amputation of his right leg and the other in the partial destruction of his right arm. He alleged and proved these facts upon his application for a pension, filed July 25, 1866. By certificate issued March 6, 1867, he was granted a pension of \$8 a month from November 5, 1865, the day of discharge from service, to June 6, 1866, and thereafterwards at the rate of \$15 a month. By act of this last-mentioned date (chap. 106, § 1, 14 Stats., 56) Congress provided "That, from and after the passage of this act, all persons by law entitled to a less pension than hereinafter specified, who, while in the military or naval service and in line of duty, shall have lost the sight of both eyes, or who shall have lost both hands, or been permanently or totally disabled in the same, or otherwise so permanently and totally disabled as to render them utterly helpless, or so nearly so as to require the constant personal aid and attendance of another person, shall be entitled to a pension of twenty-five dollars per month; and all persons who, under like circumstances, shall have lost both feet, or one hand and one foot, or been totally and permanently disabled in the same, or otherwise so disabled as to be incapacitated for performing any manual labor, but not so much so as to require constant personal aid and attention, shall be entitled to a pension of twenty dollars per month; and all persons who, under like circumstances, shall have lost one hand or one foot, or been totally and permanently disabled in the same, or otherwise so disabled as to render their inability to perform manual labor equivalent to the loss of a hand or a foot, shall be entitled to a pension of fifteen dollars per month" (14 Stats., 56).

By act of June 8, 1872, chapter 342, section 1, (17 Statutes,

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335, top,) those who had lost both feet were transferred from the second to the first class, and the rates payable to each of the above classes were increased, giving \$31.25 instead of \$25 to the first, \$24 instead of \$20 to the second, and \$18 instead of \$15 to the third, from June 4, 1872, from which date Mr. Hutchinson was paid \$18 a month to October 3, 1877, and after that \$24 a month, as hereinafter stated. It will be noticed that he was paid under these acts of June 6, 1866, and June 8, 1872, the amount payable to those who had lost "one hand or one foot." The state of legislation upon this subject at the time of the revision is found in these sections of the Revised Statutes:

SEC. 4697. "For the period commencing July fourth, eighteen hundred and sixty-four, and ending June third, eighteen hundred and seventy-two, those persons entitled to a less pension than herein mentioned, who shall have lost both feet in the military or naval service, and in the line of duty, shall be entitled to a pension of twenty dollars per month; for the same period those persons who, under like circumstances, shall have lost both hands or the sight of both eyes, shall be entitled to a pension of twenty-five dollars per month; and for the period commencing March third, eighteen hundred and sixty-five, and ending June third, eighteen hundred and seventy-two, those persons who under like circumstances shall have lost one hand and one foot, shall be entitled to a pension of twenty dollars per month; and for the period commencing June sixth, eighteen hundred and sixty-six, and ending June third, eighteen hundred and seventy-two, those persons who under like circumstances shall have lost one hand or one foot, shall be entitled to a pension of fifteen dollars per month; and for the period commencing June sixth, eighteen hundred and sixty-six, and ending June third, eighteen hundred and seventy-two, those persons entitled to a less pension than hereinafter mentioned, who by reason of injury received or disease contracted in the military or naval service of the United States and in the line of duty, shall have been permanently and totally disabled in both hands, or who shall have lost the sight of one eye, the other having been previously lost, or who shall have been otherwise so totally and permanently disabled as to render them utterly helpless, or so nearly so as to require

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regular personal aid and attendance of another person, shall be entitled to a pension of twenty-five dollars per month; and for the same period those who under like circumstances shall have been totally and permanently disabled in both feet, or in one hand and one foot, or otherwise so disabled as to be incapacitated for the performance of any manual labor, but not so much as to require regular personal aid and attention, shall be entitled to a pension of twenty dollars per month; and for the same period all persons who under like circumstances shall have been totally and permanently disabled in one hand, or one foot, or otherwise so disabled as to render their inability to perform manual labor equivalent to the loss of a hand or foot, shall be entitled to a pension of fifteen dollars per month."

SEC. 4698. "From and after June fourth, eighteen hundred and seventy-two, all persons entitled by law to a less pension than hereinafter specified, who, while in the military or naval service of the United States, and in line of duty, shall have lost the sight of both eyes, or shall have lost the sight of one eye, the sight of the other having been previously lost, or shall have lost both hands, or shall have lost both feet, or been permanently and totally disabled in the same, or otherwise so permanently and totally disabled as to render them utterly helpless, or so nearly so as to require the regular personal aid and attendance of another person, shall be entitled to a pension of thirty-one dollars and twenty-five cents per month; and all persons who, under like circumstances, shall have lost one hand and one foot, or been totally and permanently disabled in the same, or otherwise so disabled as to be incapacitated for performing any manual labor, but not so much as to require regular personal aid and attendance, shall be entitled to a pension of twenty-four dollars per month; and all persons who, under like circumstances, shall have lost one hand or one foot, or been totally and permanently disabled in the same, or otherwise so disabled as to render their incapacity to perform manual labor equivalent to the loss of a hand or foot, shall be entitled to a pension of eighteen dollars per month: *Provided*, That all persons who, under like circumstances, have lost a leg above the knee, and in consequence thereof are so disabled that they cannot use artificial

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limbs, shall be rated in the second class, and receive \$24 per month, from and after June 4, 1872; and all persons who, under like circumstances, shall have lost the hearing of both ears, shall be entitled to a pension of \$13 a month from the same date: *Provided*, That the pension for a disability not permanent, equivalent in degree to any provided for in this section, shall, during the continuance of the disability in such degree, be at the same rate as that herein provided for a permanent disability of like degree."

SEC. 4698½. "Except in cases of permanent specific disabilities, no increase of pension shall be allowed to commence prior to the date of the examining surgeon's certificate establishing the same made under the pension claim for increase; and in this as well as in all other cases the certificate of an examining surgeon, or of a board of examining surgeons, shall be subject to the approval of the Commissioner of Pensions."

SEC. 4699. "The rate of \$18 a month may be proportionately divided for any degree of disability established for which section 4695 makes no provision."

Under these statutes Mr. Hutchinson claims that he should have been rated in the second instead of in the third class, and been paid \$20 instead of \$15 between June 6, 1866, and June 3, 1872; and thereafterwards at \$24 per month instead of \$18, at which latter rate he was paid until October 3, 1877. His pension at \$15 and \$18 seems to have been based solely upon the loss of his right leg. April 25, 1877, he applied for an increase on account of the loss of the leg and partial loss of use of right arm. A certificate issued October 13, 1877, granting him a pension at \$24 a month after the third day of that month, the date of his medical certificate. This last increase was allowed under Revised Statutes, section 4697, "upon the opinion that the pensioner was so disabled as to be incapacitated for the performance of any manual labor." It will be observed that section 4698½ declares that "Except in cases of permanent specific disabilities, no increase of pension shall be allowed to commence prior to the date of the examining surgeon's certificate establishing the same, made under the pending claim for increase." The surgeon who examined Mr. Hutchinson, October 3, 1877, found "that the injury to his arm occasioned the loss of ½ of its original

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vigor," and thereupon certified that he was unable to do any manual labor; although it is seen that the disability to use the arm was not total.

Upon this state of facts you suggest these two inquiries:

1st. "Does incapacity to perform manual labor, arising from causes like the above-mentioned, constitute a *specific* disability within the meaning of section 4698½ of the Revised Statutes?"

2d. "If it does, have I (the Secretary of the Interior) the right now to allow him back pension from June 6, 1866, at the rates claimed, the disability in the arm having been shown in each of his applications for pension?"

1. I think the disabilities which are to be deemed "specific" are those *specified* in the above-cited statutes—such as the loss of a hand, foot, or eye. Injuries, like those sustained by Mr. Hutchinson, requiring medical examination to ascertain and declare their nature and extent, and as to the effect of which there is room for difference of opinion, I do not consider "specific" disabilities.

2. The answer I have felt constrained to give to the first question obviates the necessity for considering the second.

I return the papers in this case.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. CARL SCHURZ,

Secretary of the Interior.

IMPROVEMENT OF SOUTH PASS OF THE MISSISSIPPI.

Though the terms of the *proriso* to section 4 of the act of March 3, 1875, chap. 134, are in the nature of conditions, which must be performed by Mr. Eads before he is entitled to receive the payments provided in other portions of the act when the several depths and widths of channel there specified shall have been obtained, yet if, when demand for any such payment is made, all the conditions *then* required to be performed by him have been performed, he is entitled to the payment, notwithstanding other conditions remain to be complied with by him in the future.

The following facts being assumed, viz, that on April 7, 1879, a channel was obtained by Mr. Eads at the mouth of the South Pass, between the deep water of the pass and the deep water of the Gulf of Mexico, 25

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feet deep, and not less than 230 feet wide at the bottom, and that a channel existed through the pass including the shoal at its head 22 feet deep and of a navigable width: *Held* that Mr. Eads is entitled to the payment of \$500,000 provided by section 9 of the amendatory act of March 3, 1879, chap. 181, "when a channel shall have been obtained by the action of the jetties, &c., 25 feet in depth, and not less than 200 feet in width at the bottom, through said jetties"; the conditions in the *proviso* aforesaid not requiring that he shall have obtained, up to that time, through the pass and over the shoal, a greater depth than 22 feet, with a navigable width.

A "navigable width," as contemplated by said act of March 3, 1875, is a depth sufficiently wide to permit vessels, moved either by sails or steam, to pass each other in the channel formed through the pass and the shoal at its head.

DEPARTMENT OF JUSTICE,
May 17, 1879.

SIR: Your letter of the 15th instant submits to me certain questions arising under the act of March 3, 1875, and acts amendatory thereof, concerning the construction of jetties and other works at the South Pass of the Mississippi River, and informs me that Capt. James B. Eads now applies to you for the payment of the \$500,000 to which he claims to be entitled under section 9 of the act of March 3, 1879, "when a channel shall have been obtained by the action of the jetties and auxiliary works authorized by said act 25 feet in depth and not less than 200 feet in width at the bottom, through said jetties."

The engineer reports:

"That a channel existed on the 7th of April, 1879, at the mouth of South Pass, 25 feet deep, and in no place less than 230 feet wide at the bottom, between the deep water of the pass and the deep water of the Gulf of Mexico.

"Also, that on the 11th of April, 1879, there was at the head of South Pass a channel sufficiently wide for navigation, having at least a depth of 24 feet, and that the 23 feet channel at the same place had nowhere less width than 125 feet."

My attention is directed to the following inquiries:

"1. Assuming that Mr. Eads had obtained a channel 25 feet deep and not less than 230 feet wide at the bottom through the South Pass, but not through the shoal at the head of the pass, is he entitled to the payment claimed?

"2. Must all the conditions set forth in the proviso to sec-

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tion 4 of the act of March 3, 1875, be complied with before Mr. Eads can receive the payments provided in other portions of the act for obtaining the several depths and widths of channel specified?

"3. What is the meaning of the words 'a navigable depth' in said proviso, and does the law furnish any rule for determining the width of such a channel as is intended to be required by said proviso?"

Perhaps these questions can be more definitely answered together, rather than in the precise order in which you have stated them.

It has been heretofore held that the terms of the proviso to section 4 of the act of March 3, 1875, were in the nature of conditions to be complied with by Mr. Eads before he would be entitled to receive the payments provided in other portions of the act when the several depths and widths of channel specified had been obtained. But it cannot be held that Mr. Eads is bound to the performance of these conditions, except just so far as he is required to perform them up to the time when he makes his demand for payment. If, when that demand is made, all the conditions then required to be performed have actually been performed, he is entitled to the payment although other conditions yet remain to be complied with by him in the future.

The act of March 3, 1875, provided for the creation and maintenance, by means of jetties, of a wide and deep channel between the South Pass of the Mississippi River and the Gulf of Mexico. One of the conditions of this act, necessary to make the deep channel from the South Pass to the Gulf available, was that a navigable depth of water should be provided through the pass. It has been held (both by my predecessor and myself) that the conditions which apply to providing a navigable depth of water through the pass apply to the channel through or over the shoal at the head of the pass, and that this was within the proper limits of the improvement.

Mr. Eads has obtained a channel of the depth and width required between the deep water of the South Pass and the deep water of the Gulf of Mexico; and, further, he has obtained a channel 25 feet deep and not less than 200 feet wide at the bottom through the South Pass; but it does not ap-

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pear that this depth has been obtained through the shoal at the head of the pass.

It becomes necessary to inquire what Mr. Eads's duty is at this time in regard to obtaining a channel through that shoal.

By the proviso he was to obtain a navigable depth of 20 feet of water through the pass (which, as I have said, includes the shoal at the head of the pass) within thirty months after the approval of the act—March 3, 1875. Therefore, on September 3, 1877, he was to have 20 feet of water of navigable depth. He was also to obtain an additional depth of not less than 2 feet during each succeeding year thereafter until a depth of 26 feet should have been secured. Therefore, on September 3, 1878, he was to have a depth of 22 feet, but he was not required to have a depth of 24 feet until next September.

If he has secured a navigable depth of 22 feet through the pass (including the shoal at its head), he is now entitled to the payment in question.

“What is the meaning of the words ‘navigable depth’?” is a question partly of law and partly of fact. It is a depth sufficiently wide to admit of safe navigation.

In considering what was intended to be provided for, the whole character of the structure contemplated is to be examined. This shows that a channel of considerable width, in which necessarily vessels could pass each other as they ascended and descended the river, was contemplated; and this navigation is not limited to any particular class of vessels—as, for instance, those propelled only by steam. The legal meaning of the term “navigable depth” is a depth sufficiently wide, therefore, to be navigated by vessels, either moved by sails or steam, and to permit them to pass each other in the channel formed through the pass and the shoal at its head. How wide such a channel should be I am not competent to state, and it is a question of fact for the determination of the engineers, in connection with well-known facts in reference to the navigation of vessels, and also in connection with the present state of the legislation which makes the ultimate width of the channel from the South Pass to the Gulf 200 feet. In view of these considerations they must decide whether there

Case of the Steamer Nuestra Señora de Regla.

exists through the shoal at the head of said pass a channel of the navigable depth, at the present time, of 22 feet.

In answer to the principal inquiry suggested by your letter I would say that, assuming that the channel exists at the mouth of the South Pass, 25 feet deep and not less than 230 feet wide in any place at the bottom, between the deep water of the pass and the deep water of the Gulf of Mexico, and that a channel exists through the pass and the shoal at its head of 22 feet in depth, and of a navigable depth as I have endeavored to define it, Captain Eads is entitled to the payment of the \$500,000.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. GEORGE W. MCCRARY,
Secretary of War.

CASE OF THE STEAMER NUESTRA SEÑORA DE REGLA.

Upon examination of the record in this case: *Advised* that such a state of facts is presented as renders it proper that there should be an appeal to the Supreme Court of the United States.

DEPARTMENT OF JUSTICE,

May 19, 1879.

SIR: Your communication of April 4, 1879, states the substance of a letter to the Department of State from His Excellency the Spanish Minister, in relation to the case of *The United States v. The Steamer Nuestra Señora de Regla*. It also incloses a copy of a letter from the former counsel representing the steamer.

You inquire of me whether or not the case should be further prosecuted on the part of the Government by an appeal to the Supreme Court of the United States, and submit the matter for my consideration.

So far as the case involves any of the diplomatic relations of the Government I do not understand any inquiry is made of me, but that I am desired to inform you whether, assuming that the case was one entirely between private parties, such a state of facts is presented as renders it proper that there

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should be an appeal from the decision of the district court of the United States.

Without undertaking to discuss the whole matter involved in the record of the case, inasmuch as I have reached the conclusion that it is proper to take an appeal from the judgment of the district court, it seems to me appropriate that I should state some of the reasons that have led me to this result.

An examination of the record shows that the claimants of the steamer were allowed damages for a detention for a period of 568 days. Without intending to discuss the question whether the claim of the owners is otherwise well founded, it seems to me that this item of damages is exaggerated.

There was a proceeding for the appraisement of the vessel (Record, folios 27, 28), and a portion of the damages are assessed for the detention of the vessel after that date—about August 29, 1862. This proceeding for appraisement amounted to a sale to the United States; and the substance of the transaction was that the steamboat was transferred to the United States, its value and interest being substituted to abide the decrees of the court. The court had jurisdiction to sell.

By referring to sections 4624, &c., of the Revised Statutes, it will appear that the course directed to be taken by the act of June 30, 1864, is that pursued here. I understand that act to be declaratory of a practice that had previously existed, by which prizes were turned over to the United States at the appraised value, sometimes before and sometimes after adjudication—such transfer being treated as a sale. (See 1 Opin., 186; also *The Memphis*, reported by Blatchford, *Prize Cases*, 202.) The proceedings in the latter case were contemporaneous with this of the *Nuestra Señora de Regla*, i. e. July and August, 1862. (See also the *Ellen Warley*, Blatchford, *Prize Cases*, 204.)

It was an error, in my opinion, to allow damages for the detention of the ship after the appraisement was returned into court. It was further erroneous to allow for the services and expenses of the claimants' agent beyond that day. The result is that it seems to me that the number of days allowed for detention should be 274 instead of 568.

In place of this allowance for detention, there should have

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been allowed interest upon the value of the boat as appraised, namely, upon the sum of \$28,000. If this result is correct it will diminish the amount which the claimants should receive by something over \$100,000.

It does not seem to me that any irregularity as to the appraisement, or a failure to deposit exactly as ordered by the court, can affect the validity of the order. That might have been corrected by due application of the owners.

This question has never been decided; although in 17 Wall., 29, when this case was formerly before the Supreme Court, the point was then made. The court, however, declined to determine it for the reason that, upon another ground, they were satisfied that the decree must be reversed.

Without desiring to discuss the whole case, it seems to me that there is such ground for believing, in regard to the matter adverted to, that the district court was in error, that I should not be justified in failing to take an appeal.

I address this letter to yourself, as I am informed by your letter that it is the desire of the Secretary of State that the correspondence should be conducted with you on account of his former connection with the claim of the owners of the steamer.

Some delay has occurred in replying to your communication, which has been occasioned by my desire to hear fully the counsel for the claimants in the matter.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. F. W. SEWARD,

First Assistant Secretary of State.

TAX ON CIRCULATING NOTES.

The obligations issued by the Philadelphia and Reading Railroad Company, called "Wages Certificates," in sums of \$10 each, payable in money to the bearer thereof, and receivable in payment of debts due the company (a copy of which instrument is given in the opinion), are "notes used for circulation" within the meaning of sections 19 and 21 of the act of February 8, 1875, chap. 36, and subject to taxation thereunder. *Seem* that certain obligations issued by Knapp, Stout & Co., of similar

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character, payable in merchandise, are within the mischief intended to be remedied by that act; wherefore it is *advised* that the tax be exacted upon them, as it has heretofore been, under the sections aforesaid.

DEPARTMENT OF JUSTICE,
May 22, 1879.

SIR: Yours of the 16th instant calls my attention to these three sections of the act of February 8, 1875, chap. 36, viz:

SEC. 19. "That every person, firm, association other than national bank associations, and every corporation, State bank, or State banking association, shall pay a like tax of ten per centum on the amount of notes of any person, firm, association other than a national banking association, or of any corporation, State bank, or State banking association, or of any town, city, or municipal corporation, used for circulation and paid out by them."

SEC. 21. "That the amount of such circulating notes, and of the tax due thereon, shall be returned, and the tax paid at the same time, and in the same manner, and with like penalties for failure to return and pay the same, as provided by law for the return and payment of taxes on deposits, capital, and circulation, imposed by the existing provisions of internal revenue law." (18 Stat., 311, 312.)

You inquire whether certain obligations, inclosed in your letter, are "notes used for circulation" within the meaning of the foregoing sections. Copies of two of these instruments are subjoined, by which it will be perceived that some of them are payable in merchandise, while others are to be paid in money. Those issued by Knapp, Stout & Co. are of the former character, and those of the Philadelphia and Reading Railroad Company of the latter, viz:

"Philadelphia & Reading R. R. Co. Wages Certificate.

"No. 42161.]

PHILADELPHIA, December 16th, 1878.

"The Philadelphia & Reading Railroad Company promises to pay to the bearer hereof the sum of Ten Dollars on the Fifteenth day of May, 1879, with interest from date, without defalcation, for value received.

"This note is issued for wages due by the Philadelphia & Reading Railroad Company, and will be received either before

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or at its maturity, for the amount due thereon, in payment for freight and toll bills of the Philadelphia & Reading Railroad Company and for coal bills of the Philadelphia and Reading Coal & Iron Company or any other debts due to either of the said company.

"\$10.00.

T. B. GOWEN,

"S. BRADFORD,

"*President.*

"*Treasurer.*"

"STATE OF WISCONSIN.

THE

[5.]

"[Five.]

KNAPP, STOUT & CO. COMPANY,

Menomonee.

"Will pay to bearer on demand Five Dollars in Merchandise or Lumber.

"Payable only at the places of business in Dunn and Barron counties, Wisconsin.

"THE KNAPP, STOUT & CO., COMPANY,

"Per GEO. H. BARWIN."

The inclosures accompanying and referred to in your communication (which are herewith returned) establish the fact that both these forms of obligation circulate freely and extensively in the vicinage of their issue, and these subserve all the uses of money. Persons competent to judge estimate the amount put and kept in circulation by Knapp, Stout & Co. at from \$75,000 to \$100,000; while the official report of the Philadelphia and Reading Railroad Company, dated on the 13th day of January last, states that the unpaid wages due its employes for September, October, and November preceeding amounted to \$983,141.59, for which it was determined to issue "wages certificates" in sums of \$10 each (of which the foregoing is a sample), of which \$701,520 had been put in circulation up to January 11, 1879; and their issue has been kept up since that date. The report says of them: "These certificates have been very favorably received by the employes and the public, and they are generally taken in business transactions at par, and are readily sold for cash at but a trifling discount."

When it is considered that many other persons and corporations in various sections of the country are doing the same thing, the extent to which these notes are used as currency

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can be understood. That these instruments are all "used for circulation," and as a medium of exchange, is fully proved. Those of the railroad company plainly contemplate circulation, since it is expressed upon their face that they are based upon the wages due, but are receivable from those indebted to the company for coal or for transportation; and their favorable reception by the public, as well as by employes, and their general use in business transactions, are subjects of felicitation in the before-mentioned report. It seems clear to me that these notes come precisely within the language of the statute indicating what "notes" are to be the subject of taxation.

While the obligations solvable in merchandise may not come within the technical definition of a negotiable promissory note, as given by most text-writers and courts, yet it is of frequent occurrence for eminent judges to speak of an instrument calling for goods to a specified value as a note. Numerous cases of this kind might be cited. While, therefore, there is more room for doubt upon this species of obligation, I think these notes come so evidently within the mischief intended to be remedied by the statute, that I advise an adherence by the Commissioner of Internal Revenue to the construction subjecting them to taxation, since thus only can the question be brought to an authoritative determination of the highest Federal tribunal.

The cases of *United States v. Van Auken* (96 U. S. 366) mentioned by you is not decisive of the present discussion. It involved the construction of an entirely different statute, forbidding the issue of any "obligation, for a less sum than one dollar, intended to circulate as money." The opinion of the court turns upon the construction to be given the phrase "for a less sum than one dollar," which is not found in the sections we are now considering. It was held that the statute there invoked applied only to instruments payable in money, because the words "for a less sum than one dollar" were but equivalent to saying "for a less sum of money than one dollar." Therefore recourse must be again had to the Supreme Court before we can obtain an entirely satisfactory determination of the question whether or not the obligations you now refer to, payable in goods, are subject to the tax imposed by the above

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cited sections. In the meantime I think such tax should be exacted as it has heretofore been.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. JOHN SHERMAN,

Secretary of the Treasury.

IMPROVEMENT OF SOUTH PASS OF THE MISSISSIPPI.

Upon consideration of the provisions of the acts of March 3, 1875, chap. 134, June 19, 1878, chap. 313, and March 3, 1879, chap. 181, and assuming that the conditions in the *proviso* to section 4 of the act of 1875 relating to the pass itself and the shoal at its head had been complied with on April 7, 1879, and that on that day a depth of 25 feet with a width of 200 feet had been obtained in the channel between the jetties at the mouth of the pass: *Held* that Mr. Eads is entitled to the payment of \$500,000 under section 9 of the act of 1879, notwithstanding that the width of the channel has since been diminished.

DEPARTMENT OF JUSTICE,

May 24, 1879.

SIR: In conversation yesterday you submitted to me an inquiry arising upon the following state of facts:

Assuming that it appeared to you that on the 7th day of April last Captain Eads had complied with all the conditions of the act so far as relates to maintaining a channel through the South Pass and the shoal at its head, and, further, had obtained in the channel from the South Pass to the Gulf of Mexico a depth of 25 feet and a width of not less than 200 feet, is he now entitled to the payment of \$500,000 contemplated by the act of March 3, 1879, which provides that "When a channel shall have been obtained by the action of the jetties and auxiliary works authorized by said act twenty-five feet in depth, and not less than two hundred feet in width at the bottom, through the said jetties, there shall be paid five hundred thousand dollars"—the further fact now appearing that since the 7th day of April the channel from the South Pass to the Gulf of Mexico has been reduced in width by the action of the current, from over 200 feet (namely 230 feet) to 140 feet, in certain points, still retaining, however, through this width, the depth of 25 feet.

The original act contained four provisions for payments on

Improvement of South Pass of the Mississippi.

obtaining certain depths and widths of channel, which were to be accompanied by additional payments for maintaining such channels for a year; thus, upon obtaining channels of 24, 26, and 28 feet, of the width required by the act, Mr. Eads was to receive the sum of \$500,000; and upon maintaining each of these depths for a year he was to receive the additional sum of \$250,000; on obtaining the depth of 30 feet, &c., he was to receive the sum of \$500,000; and, on maintaining it for a year, the additional sum of \$500,000. All the additional sums for maintaining the depths, &c., were to be paid with interest.

The act of June 19, 1878, provided for the payment of \$500,000 to Mr. Eads upon his "relinquishment of all claim to the payment of \$500,000 provided by the hereinbefore-recited act to be paid when a channel of 24 feet in depth and not less than 250 feet in width shall have been obtained." The third section of the same act authorizes a further payment to Mr. Eads, in the aggregate not to exceed the sum of \$500,000, to be paid monthly "for materials furnished, labor done, and expenditures incurred, from and after the passage of this act, in the construction of said works." The same section provided that Mr. Eads is to relinquish all claim to the deferred payment of \$250,000 provided for in the act of March 3, 1875, which was to be paid for maintaining for twelve months a channel of 24 feet in depth, &c.; and, further, that from time to time Mr. Eads was to relinquish, as monthly installments of the remaining \$250,000 were paid, like amounts, which were to be deducted from the \$500,000 provided for by the act of March 3, 1875, when a channel 26 feet in depth, &c., should have been obtained.

The effect of these provisions was, therefore, to substitute for the payment to be made according to the original act on obtaining the depth of 24 feet, &c., a payment in advance of \$500,000; and a further payment of \$500,000 for materials furnished, &c., which was to be compensated for by the deferred payment of \$250,000 due upon maintaining the depth of 24 feet, and one-half of the payment of \$500,000 due upon obtaining the depth of 26 feet.

This being the state of the law, the act of March 3, 1879, provided for a system of payments to be made in lieu of the

Improvement of South Pass of the Mississippi.

payments before provided for. This latter system was as follows: \$750,000 were to be immediately paid to Mr. Eads. When a channel was obtained 25 feet in depth, &c., \$500,000 were to be paid; when it shall have obtained 26 feet, &c., an additional \$500,000 were to be paid; and when a channel 30 feet in depth, without regard to width, had been obtained through the jetties, there was to be paid \$500,000.

By these changes, Mr. Eads was to receive the same sum that was provided for in the original act; but he was to receive it on different terms; and it will be observed that the deferred payments of the original act which related to his maintaining the depths of 24, 26, 28, and 30 feet respectively were absorbed by the various payments directed to be made by the acts of June 19, 1878, and March 3, 1879. The deferred payment upon obtaining 24 feet having been otherwise provided for by the act of June 19, 1878, and the remaining three deferred payments upon obtaining 26, 28, and 30 feet respectively being absorbed by the payments provided for by the act of March 3, 1879.

The act of March 3, 1879, is explicit in its statement that nothing therein contained is to affect or repeal in any way the provisions of the act of June 19, 1878. While it cannot be doubted that Congress has constantly kept in view the intent expressed in the original act, namely, that of authorizing "Mr. Eads and his associates to create and permanently maintain a wide and deep channel between the South Pass and the Gulf," these alterations remove from the act the provisions for payments which were to be deferred in order to secure the maintenance of the channel at particular depths. They leave the security for the maintenance of the channel to other provisions of the act which it may be fairly deemed Congress considered sufficient for the purpose. The original act contemplated that Mr. Eads was to receive the sum of \$5,250,000 for his work. It provided for payments in the manner I have adverted to, upon obtaining and maintaining specified depths and widths of channel. But these payments only cover \$4,250,000. The original act provided that when a channel 30 feet in depth and 350 feet in width (which was the original width contemplated) shall have been obtained by the effect of the said jetties and auxiliary works, the remaining \$1,000,000

Improvement of South Pass of the Mississippi.

shall have been deemed earned by the said Eads and his associates; and said amount shall remain as security in the possession of the United States for the purposes therein set forth. Those purposes were, that when the channel at its full width and depth should have been maintained for ten years, Eads should receive the sum of half of \$1,000,000, and when the same depth and width should have been maintained ten additional years, he should receive the remaining half of the same \$1,000,000.

The same act contemplated that after the full completion in width and depth, Mr. Eads and his associates should also receive \$100,000 per annum in equal quarterly payments so long as the channel should be maintained for a period of twenty years from that date at the ultimate depth and width.

In relinquishing the deferred payments above adverted to upon obtaining the specified depths, it is to be observed that the United States still retains as security for the maintenance of his work by Mr. Eads the sum of \$1,000,000, and the further sum of \$100,000 per year for twenty years, which the United States agrees to pay provided the channel is maintained.

An examination and comparison of these acts, which are perhaps complicated rather from the number and variety of the payments than from any legal difficulties, leads me to the conclusion that Mr. Eads is now entitled to the payments provided for by the act on obtaining the specified depths and widths, even if after obtaining them there should by accident or otherwise be a filling up of the channel which should reduce the width, provided of course that the conditions which relate to the pass itself and the shoal at its head are at the same time complied with.

This opinion is fortified by the character of the act. Unless Mr. Eads goes forward and obtains the greater depth which he is required to obtain he can receive no more money. When he obtains the ultimate depth, &c., of 30 feet, although he will be entitled to receive all that is then contemplated to be paid for obtaining such depth and width, yet he will still find himself under the necessity of maintaining the same depth and width if he would establish his claim to the payment of \$100,000 annually for a period of twenty years, and the sum of \$1,000,000

Case of Prior H. Coleman.

which is to be paid in two installments of half a million each, upon the maintenance for ten and twenty years respectively of the channel, together with the interest upon this million.

In answer, then, to your oral inquiry, I have to say that, assuming that the conditions relating to the pass itself and the shoal at its head had been complied with on the 7th day of April last, and that Mr. Eads on that day had obtained a depth of 25 feet in the channel between the South Pass and the Gulf, with a width of 200 feet in the same channel, he is entitled to the payment of \$500,000, notwithstanding that since that date the width of the channel has been diminished.

Very truly, your obedient servant,

CHAS. DEVENS.

Hon. GEORGE W. McCRARY,
Secretary of War.

CASE OF PRIOR H. COLEMAN.

C., being then a soldier in the service of the United States, was, on the 24th of March, 1865, sentenced by a court-martial to be hanged for desertion, robbery, and murder. The proceedings of the court were approved by the officer in command of the department, and the sentence ordered to be executed on the 21st of July, 1865. The execution did not take place, for the reason (as is presumed) that the prisoner escaped. In 1870, C. applied to the military authorities for an honorable discharge (the application being based on certain statements afterwards discovered to be false), which was granted, and dated June 5, 1865. This discharge was subsequently revoked, and the certificate canceled by the War Department, on the ground that it was given under a misapprehension of facts caused by the false statements aforesaid. On the 5th of May, 1875, he was dishonorably discharged as of July 21, 1865, the day appointed for his execution. *Held*, (1) that the revocation of the "honorable discharge" and cancellation of the certificate thereof were proper; (2) that the second discharge operated to cut C. off dishonorably from the service, but did not alter his status as a military prisoner awaiting execution of sentence; (3) that no legal obstacle now exists to the execution of the sentence. But (on considerations stated in the opinion) recommended that the sentence be commuted to imprisonment for life, or to such term of years as the President may in his discretion determine.

DEPARTMENT OF JUSTICE,

May 27, 1879.

SIR: Your letter of the 13th instant states the case of Prior H. Coleman, formerly a soldier in the military service of the

Case of Prier H. Coleman.

United States, who, for desertion, robbery, and murder, was on the 24th day of March, 1865, at Knoxville, Tenn., sentenced by a general court-martial to be hanged. Maj. Gen. George H. Thomas, then commanding the Department of the Cumberland, approved the proceedings of the court and ordered the sentence to be carried into execution, fixing as the date thereof the 21st day of July, 1865.

The execution did not take place, and the records of the War Department do not furnish any evidence or ground for the inference that it was stayed by any official order or action. It is therefore to be presumed that the prisoner made his escape.

In the year 1870 he applied to the officer commanding the Department of the South for an honorable discharge, presenting at the same time his affidavit, in which he stated that without fault or misconduct of his own he was absent in confinement at the time of the mustering out of his regiment, June 5, 1865. The application having been referred to the Adjutant-General, that officer advised that Coleman be furnished with a proper discharge, if it satisfactorily appeared that none had been made out for him. On the 29th of July, 1870, a certificate of honorable discharge bearing date June 5, 1865, was delivered to him.

This certificate was subsequently canceled by the Adjutant-General, who made upon it the following record :

“WAR DEPARTMENT,
“ADJUTANT-GENERAL’S OFFICE,
“March 21, 1876.

“This discharge was furnished under a misapprehension of the facts in the case, caused by a false statement made by the applicant. This discharge was revoked on that account, and in addition the man was a deserter and remained absent until arrested. He was tried for desertion, robbery, assault with intent to kill, and the murder of a woman; he was found guilty of the several charges, sentenced to be hanged, and the sentence ordered to be executed. As a thorough search of the records fails to discover that this death sentence was mitigated, it is supposed the man made his escape before the sentence could be executed.”

Case of Prier H. Coleman.

On the 5th of May, 1875, Coleman was dishonorably discharged as of July 21, 1865—the day appointed for his execution.

On the 2d of October, 1874, he was indicted for murder in a criminal court of the State of Tennessee, charged with killing the same person for the murder of whom he was convicted by the court-martial. He was found guilty by the jury of the State court, and was sentenced to death. This judgment was affirmed by the supreme court of Tennessee.

The case was then taken by writ of error to the Supreme Court of the United States, which reversed the judgment of the State court, discharged the prisoner from the custody of the State officer, and directed that he be delivered to the military authorities of the United States "to be dealt with as required by law." Coleman is now held as a prisoner by the military authorities at McPherson Barracks, Atlanta, Ga.

Upon this statement of the facts and proceedings, I say, in answer to your first inquiry, I see no legal obstacle to the execution of the sentence of the court-martial.

By the judgment of the Supreme Court, he is in the hands of the military power, to be dealt with as required by law. The last sentence of that judgment reads thus:

"But as the defendant was guilty of murder, as already appears not only by the evidence in the record in this case, but in the record of the proceedings of the court-martial, a murder committed, too, under circumstances of great atrocity, and as he was convicted of the crime by that court and sentenced to death, and it appears by his plea that said judgment was duly approved and still remains without any action having been taken upon it, he may be delivered up to the military authorities of the United States, to be dealt with as required by law."

The purpose of the prisoner's delivery to the military authorities is here clearly indicated, namely, his execution according to the sentence of the military court. The military power had no shadow of claim to the custody of the prisoner except to inflict upon him the punishment denounced against him by the court-martial.

But the matter of his discharges from the military service does not seem to have been before the court.

I will consider briefly the effect of these discharges; and, first, the "honorable discharge," a certificate of which the prisoner received in 1870, must be treated as a nullity. It was obtained by the grossest falsehood and perjury. In his affidavit he deposed that at the time of the discharge of his regiment he was in confinement for no fault or misconduct on his part. In *fact*, he was then a prisoner convicted of an infamous crime and under sentence of death, conditions with which an honorable discharge is incompatible. The conditions upon which it was possible to grant an honorable discharge did not exist. There could, then, be no such discharge, and the certificate given in 1870 was rightly canceled, and the discharge itself revoked.

The effect of the second discharge was simply to cut him off dishonorably from the service, as of the date fixed for his execution. It did not relieve him of his status as a military convict awaiting the execution of his sentence. On this point I beg to refer to my opinion rendered to the Secretary of War, March 26, 1879.

In reply to your second inquiry, I am compelled to say that I discover no ground or reason in the facts and circumstances connected with the commission of the crime for the exercise of clemency towards the prisoner. But considering the long period that has elapsed since his trial; that the crime was committed at a time of great public disorder; and the possibility, upon a review of the case by a judicial tribunal, that different conclusions might be reached from those expressed above, I think it right to make such disposition of the prisoner as that he shall be within the reach of judicial process. I will recommend, therefore, that his sentence be commuted to imprisonment for life, or to such term of years as the President may in his discretion determine.

Very respectfully, your obedient servant,

CHAS. DEVENS.

HON. SECRETARY OF WAR.

Importation of Antiquities.

ATLANTIC AND PACIFIC TELEGRAPH COMPANY.

The Postmaster-General has authority, under section 2 of the act of July 24, 1866, chap. 230, to fix the rates at which telegraphic communications between the several Departments of the Government and their officers and agents shall be carried over the line controlled by the Atlantic and Pacific Telegraph Company.

DEPARTMENT OF JUSTICE,

May 27, 1879.

SIR: Referring to your letter of the 3d ultimo, in reference to the account of the Union Pacific Railroad Company for the transmission of telegraphic messages during the month of November, 1876, I have the honor to say that, after carefully examining the facts set forth by you, I am of opinion that you can properly and legally resist the claim of the Union Pacific Railroad Company, and that you are entitled to pay the Atlantic and Pacific Telegraph Company for the service performed for your Department by it, although a certain portion of that service was performed over and by means of the use of a line transferred to it by the Union Pacific Railroad Company.

In this view of the matter, you are entitled, under the second section of the act of July 24, 1866, chap. 230, to fix the rates at which telegraphic communications between the several Departments of the Government of the United States and their officers and agents shall be carried over the line now controlled by the Atlantic and Pacific Telegraph Company.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. DAVID M. KEY,

Postmaster-General.

IMPORTATION OF ANTIQUITIES.

Where four cases, containing coins, clay figures, arms and implements of ancient origin (the coins not being arranged in "cabinets") were imported for sale by the importer in the regular course of his business: Held that the coins, if of gold, silver, or copper, are entitled to entry

 Importation of Antiquities.

free of duty under section 2505 Rev. Stat., but that the other articles are not thus entitled.

The words "all other collections of antiquities," as employed in the following clause of the free list contained in that section, viz, "Cabinets of coins, medals, and all other collections of antiquities," mean such collections as are *ejusdem generis* with the other articles mentioned in the same clause; and hence, where imported for sale, they must be of like character with coins and medals in order to be entitled to free entry.

Medals are exempt from duty only when imported in cabinets. But, by virtue of another clause in the same section, all *coins* of gold, silver, or copper are exempt, without regard to the date of coinage, whether placed in cabinets or not.

DEPARTMENT OF JUSTICE,

June 9, 1879.

SIR: The construction placed by you upon the statute relating to the importation of antiquities, as indicated in yours of 24th ultimo, is deemed the proper one.

In the free list, as given in the Revised Statutes, section 2505, page 484, are found these items: "*Cabinets* of coins, medals, and all other collections of antiquities;" * * * "*Coins*, gold, silver and copper;" * * * "and collections of antiquity, specially imported and not for sale." * * *

The four cases which the importer in the present instance claims to have exempt from duty contained coins, clay figures, arms and implements of ancient origin. They were brought here for sale by him in the regular course of his business. It is not stated that the coins were arranged in "cabinets," or that the other articles constituted what are known as "collections of antiquities;" therefore I assume the reverse to be true.

Congress intended to admit free under the above-mentioned clauses only that arrangement of such articles, chronological or other, as is commercially known as a "collection."

All coins of gold, silver, or copper are free, regardless of the date of coinage, whether placed in cabinets or not. *Medals*—which are technically defined to be "a piece of metal, usually bronze, gold, or silver, impressed in the manner of coins, though never intended like them to serve the purposes of mercantile currency, but to celebrate some event or the memory of some person"—are only exempt when imported in "cabinets."

 Protests and Appeals in Customs Cases.

"Collections" of antiquity are twice mentioned in the free list; first, in connection with coins and medals; and again, if "specially imported and not for sale." If collections of *every description* of antiquities were free under the first clause, the second would be superfluous. The insertion of the second vindicates the propriety of your application of the *ejundem-generis* principle of construction to the first, requiring all collections imported for sale to be of like character with coins and medals.

The coins in the four cases imported by Mr. Fenardent, if of the specified metals, were entitled to free entry. The other articles, even if constituting a "collection," were not thus entitled, because they were *not* "specially imported," but were intended "for sale;" but it does not appear that they were in fact to be considered as "collections" of antiquities.

Very respectfully, your obedient servant,

CHAS. DEVENS.

HON. JOHN SHERMAN,

Secretary of the Treasury.

 PROTESTS AND APPEALS IN CUSTOMS CASES.

In view of the apparent conflict of opinion as to the time when protests and appeals in customs cases should be filed under section 2931 Rev. Stat., between the decision in the later case of *Keyser v. Arthur* (per Judge Shipman), in the United States circuit court for the southern district of New York, and the decision in the case of *Watt v. United States* (per Chief Justice Waite), in the same court, to which last-mentioned case reference is made in the opinion of the Attorney-General on the same subject, of October 31, 1878 (*ante*, p. 197), no objection is perceived to the Treasury Department following the rule that it has heretofore adopted in regard to protests and appeals in such cases. But it is a question for the Supreme Court finally to determine, whether papers filed agreeably thereto constitute a protest and appeal within the meaning of the statute and can be treated as filed within the time required by the statute.

DEPARTMENT OF JUSTICE,

June 11, 1879.

SIR: Yours of April 26th last is received. It refers to my communication of October 31, 1878, in regard to the decision of Mr. Chief Justice Waite in the case of *James O. Watt v.*

Protests and Appeals in Customs Cases.

The United States, which involved the question as to the time when appeals could be filed under section 2931 of the Revised Statutes.

You forward a brief prepared by Messrs. Hartley and Coleman, of New York, which refers to a decision rendered in the United States circuit court at New York by Judge Shipman, in the case of *Keyser v. Arthur*, which decision was subsequent to that in *Watt v. The United States*.

The doctrine laid down in the decision of Judge Shipman would seem to imply that the exaction by the collector, on entry, of a duty, was such a liquidation as to justify the filing of protest and appeal therefrom, even although such first liquidation received a final revision on the part of the collector to complete the necessary accounts of his office.

Your letter informs me that it has been the rule for a long time in the Department for the chief officer of customs at the various ports to receive appeals and forward them to the Department, which appeals would be considered as equivalent to the filing of appeals at the Department itself; and that it has also been the practice to recognize as valid protests and appeals filed after the exaction of the duty at a certain specified rate, although filed before the final and formal liquidation of the entry on the books of the custom-houses by which the account was made up, and such papers have generally been reserved by the collector until the final liquidation was completed, and then transmitted to the Department for action.

In view of the decision in *Keyser v. Arthur* you inquire my opinion:

1. Whether in cases where duties at a specified rate are exacted as a condition of making entry of imported merchandise, or security for such specified rate is required, protest and appeal may be legally lodged with the collector subsequent to the time of such exaction on taking security, even though the final account may not have been made up by which the precise amount of duty is determined.

2. Whether appeals received by collectors of customs in advance of the final liquidation of the duties, and not transmitted to the Department until after such final ascertainment and liquidation, may be considered as filed within the time required by section 2931 of the Revised Statutes.

Protests and Appeals in Customs Cases.

In view of the difference of opinion (which seems to me not easily reconciled) between Mr. Chief Justice Waite and Judge Shipman, I am reluctant to express an opinion upon the questions referred to. It must be left to the Supreme Court to determine finally whether or not parties may lodge in advance, as claimed by Messrs. Hartley and Coleman, protests against the decisions of the United States officers, which protests are to acquire validity as soon as the final decision is made.

I can see no objection to the Department following the rule that it has adopted and carried out. It can, should it be deemed advisable, permit persons making protests and appeals to file papers in advance which shall ultimately become protests and appeals; but it must be a question for the court whether such papers thus filed will constitute a protest and appeal as required by law, and can be treated as filed within the time required.

In view of the apparent conflict in the two decisions referred to, it would seem entirely proper for the Department to adopt a rule such as will give the merchants entering goods the benefit of the construction that they desire, should they be entitled to such construction. On the other hand, it would not seem advisable that the Department should complicate itself in the administration of its duties by holding out, inferentially or otherwise, to parties entering goods that protests and appeals can be held to be valid such as those that have been held to be otherwise in the opinion delivered by Mr. Chief Justice Waite.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. JOHN SHERMAN,

Secretary of the Treasury.

Restoration of Deserting Seamen.

RESTORATION OF DESERTING SEAMEN.

Section 5280 Rev. Stat., which provides for the restoration of seamen deserting from vessels of foreign governments which have treaties with the United States stipulating therefor, applies only to cases of desertion that occurred while the vessel was in a port of the United States and wherein the person charged with desertion is not a citizen of the United States.

DEPARTMENT OF JUSTICE,

June 12, 1879.

SIR: In reply to your letter of the 5th of June, I have the honor to state that the statute enacted to carry into effect the treaty stipulation with foreign governments relative to the restoration of deserting seamen makes it the duty of any court judge, commissioner of any circuit court, justice, or other magistrate having power to issue warrants, to cause the arrest of such deserters for examination, when the consul of any foreign government having such treaty stipulation with the United States shall make application in writing, stating that the person therein named has deserted from a vessel of such government *while the vessel was at any port of the United States*, exhibiting at the same time proof by the register of the vessel, ship's roll, or other official document, that the person or persons named belonged to her crew at the time of desertion.

The statute provides further that if, on the hearing, the facts stated are found to be true, the person arrested, *not being a citizen of the United States*, shall be delivered to the consul or detained at his request, &c. (section 5280, Rev. Stat., 2d ed., p. 1023).

Upon reading this statute, it is plain that the Congress of the United States has considered that this Government fulfills its obligation under the treaty stipulation concerning deserting seamen when it causes their arrest and delivery in cases where the desertion is proved to have taken place in ports of the United States, and the persons charged are not citizens of the United States.

It appears from your statement of the case of the three men claimed by the Portuguese corvette *Palmella* that they left that ship while she was lying at anchor in the port of

Duty on Ale and Beer.

Lisbon. Upon this statement it is clear that they were not liable to arrest under the statute. The commissioner by whom their case was heard could not but discharge them. The fact that these men, after deserting from the *Palmella*, took refuge on board the American frigate *Constitution* would seem to have no material bearing upon the case, nor does it seem pertinent to inquire as to the conduct of the commissioner towards the men after their discharge. These matters did not and could not affect the inevitable result, to wit, that the three young men arrested in New York for desertion from the *Palmella* in the port of Lisbon must be set at liberty.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. WM. M. EVARTS,
Secretary of State.

DUTY ON ALE AND BEER.

In determining the duty to be assessed on ale, porter, and beer, under section 2504 Rev. Stat., schedule D, the word "gallon," as there used, is to be understood as meaning a gallon containing 231 cubic inches, known as the wine-gallon.

DEPARTMENT OF JUSTICE,
June 25, 1879.

SIR: Yours of the 20th instant, accompanying memorial of the New York importers of ale and beer (herewith returned), asks my opinion as to the true standard of measurement for these liquors in determining the duty to be assessed thereon.

The Revised Statutes, section 2504, schedule D, page 464, imposes this duty: on "ale, porter, and beer in bottles, 35 cents per gallon; otherwise than in bottles, 20 cents per gallon." The point to be decided is the meaning of the word "gallon" as here used. In an opinion delivered in 1834 the United States Supreme Court declared that "all laws regulating the payment of duties are for practical application to commercial operations, and are to be understood in a commercial sense." (*United States v. 112 Casks of sugar*, 8 Pet., 279.)

This declaration has since been oft repeated, and is now

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an axiom in the construction of tariff laws. The earlier arithmetics or the legislation of 1799 (chap. 202, § 103, 1 Stats., 701), which recognized the existence of two measures designated as "wine-measure" and "beer-measure," is hardly to be considered, unless it be shown that this distinction is still known and maintained in *commercial usage*. Such does *not* appear to be the case. The "gallon" of our commerce conforms to the old "wine-measure" of 231 cubic inches. The note to this word "gallon" in Worcester's Dictionary concludes thus: "The wine-gallon of 231 cubic inches contains 8.355 pounds avoirdupois of distilled water *and is the Government or customs gallon of the United States*, and the legal gallon of each State in which no law exists fixing a State or statute gallon."

The *sole* definition given by Bouvier in his Law Dictionary is this: "A gallon is a liquid measure containing 231 cubic inches, or four quarts." Appleton's Cyclopædia states that "the gallon of the United States is the standard or Winchester wine-gallon of 231 cubic inches," &c.

A Congressional resolve, approved June 14, 1836 (5 Stats., 133, top), directed the Secretary of the Treasury "to cause a complete set of *all* the weights and measures *adopted as standards*, and now either made or in the progress of manufacture for the use of the several custom-houses, and for other purposes, to be delivered to the governor of each State in the Union, or such person as he may appoint for the use of the States respectively, *to the end that a uniform standard of weights and measures may be established throughout the United States.*"

The only gallon measure made and distributed under this act was that containing 231 cubic inches. Among the States assenting to it was New York, whose legislature declared that "the standard weights and measures now in charge of the Secretary of State, being the same that was furnished to this State by the Government of the United States, in accordance with a joint resolution of Congress, approved June 14, 1836, and consisting of one standard yard measure; * * * one set of liquid capacity measures, consisting of one wine gallon of 231 cubic inches, one half gallon, one quart, one pint, and one half-pint measure, * * * shall be the standards of weight and measure throughout this State." (2 N. Y.

Duty on Ale and Beer.

Rev. Stats. (Banks & Bros., 6th ed., A. D. 1875), pp. 799, 800, ch. xix, Title II, § 1.)

Acquiescence upon the part of the mercantile community led the collector of Boston to assess duties upon malt liquors according to the old wine-measure; which action was confirmed by you January 5, 1871, "on the ground that this practice was in accordance with existing commercial usage in this country."

For some reason the Commissioner of Internal Revenue instructed his gaugers to ascertain the quantity of domestic malt liquors by reference to the old beer-gallon of 282 cubic inches, and declined to change these instructions, though the Brewers' Association unanimously declared the old wine-measure to be the proper uniform standard. Hence the act of March 1, 1879, chap. 125, § 21, (declaring "that the word 'gallon,' wherever used in the internal-revenue laws relating to beer, lager beer, ale, porter, and other similar fermented liquors, shall be held and taken to mean a wine-gallon, the liquid measure containing 231 cubic inches,") was passed, not to establish an exception, but to introduce into the excise conformity to the standard long before existing in the customs service and recognized by the mercantile community.

In your letter you state it to be the understanding of your Department "that in England, from whence most of the malt liquors imported into the United States are shipped, it is the practice and commercial usage to recognize the beer gallon as the standard of measurement for malt liquors."

Whether this understanding is correct or not is immaterial, since it is the usage of our own trade which is to govern. (Two hundred chests of tea, 9 Wheat., 430, 438, bottom, and other cases.) Liquids bought by the acre in France would be dutiable per gallon here. It may be observed, however, that in 1824 an imperial gallon was created by act of Parliament, conforming neither to the old wine nor beer measure; and it was declared that "all other measures of capacity to be used, as well for *wine, beer, ale*, spirits, and all sorts of liquids, as for dry goods not measured by heaped measure, shall be derived, computed, and ascertained from such gallon; and all measures shall be taken in parts, or multiples, or certain proportions of the said standard imperial gallon." It was sub-

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sequently enacted "that from and after the 5th of January, 1826, whenever any gallon measure is mentioned, in any act of Parliament relative to the excise, it shall be taken and deemed to be a gallon imperial standard measure."

The practice prevailing at the several ports, under the ruling of your Department of January 5, 1871, hereinbefore mentioned, of assessing duty on malt liquors according to the gallon of 231 cubic inches, is correct.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. JOHN SHERMAN,

Secretary of the Treasury.

IMPROVEMENT OF SOUTH PASS OF THE MISSISSIPPI.

The provisions of the act of March 3, 1875, chap. 134, and of the amendatory acts of June 19, 1878, chap. 313, and March 3, 1879, chap. 181, in so far as they relate to the payments to Mr. Eads, restated; and held that (upon the assumption that he has obtained a channel of 26 feet in depth and 200 feet in width from the deep water of the South Pass to the deep water of the Gulf of Mexico, including the requisite depth through the pass and over the shoal at its head, and has complied in all other respects with his contract) he is entitled to receive the sum of \$500,000, under the provisions of the said act of March 3, 1879.

DEPARTMENT OF JUSTICE,

June 28, 1879.

SIR: Yesterday you orally inquired of me whether Captain Eads is entitled to \$500,000, or only \$250,000, upon obtaining a channel 26 feet deep and 200 feet wide through the South Pass of the Mississippi River to the Gulf of Mexico (including the requisite depth in the pass and over the shoal at the head of the pass); or, to state your question in another form, whether the sum of \$250,000, heretofore advanced to him, being one-half of the sum to be paid under the act of March 3, 1875, for a channel 26 feet deep and 300 feet wide, is to be deducted from the payment for a channel 26 feet deep and 200 feet wide provided for by the act of March 3, 1879.

Your question assumes, of course, that in other respects Captain Eads has complied with his contract—that is, in maintaining the depth and width through the South Pass

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itself and the shoal at its head, which he is bound at this time to maintain—and relates only to the amount of payment now to be made upon his having obtained a channel 26 feet deep and 200 feet wide.

It is necessary for me to recapitulate briefly the provisions of the several acts bearing upon this subject, confining myself to them so far as they relate to payments to Mr. Eads. This I will do substantially in the terms of my letter to you of May 24, 1879.

The original act of March 3, 1875, contained six provisions for payments on obtaining certain depths and widths of channel, four of which were accompanied by additional payments for maintaining such channels for a year. Thus, on obtaining a channel of 20 feet in depth, of the prescribed width, Mr. Eads was to receive \$500,000; on obtaining a channel of 22 feet in depth, and the appropriate width, he was to receive \$500,000; upon obtaining channels of 24, 26, and 28 feet in depth, of the width required by the act, he was to receive the sum of \$500,000 for each, and upon maintaining them for a year he was to receive the additional sum of \$250,000 for each; and on obtaining a depth of 30 feet, &c., he was to receive the sum of \$500,000, and \$500,000 additional for maintaining the same for a year. All the additional sums for maintaining depths, &c., were to be paid with interest.

The act of June 19, 1878, provided for the payment of \$500,000 to Mr. Eads, upon his "relinquishment of all claim to the payment of \$500,000 provided by the hereinbefore recited act to be paid when a channel of 24 feet in depth and not less than 250 feet in width shall have been obtained."

The third section of the same act authorized a further payment to Mr. Eads, in the aggregate not to exceed the sum of \$500,000, to be paid monthly, "for materials furnished, labor done, and expenditures incurred, from and after the passage of this act, in the construction of said works." It also provided that Mr. Eads was to relinquish all claim to the deferred payment of \$250,000 provided for in the act of March 3, 1875, which was to be paid for maintaining for twelve months a channel of 24 feet in depth, &c.; and, further, that from time to time he was to relinquish, as monthly install-

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ments of the remaining \$250,000 were paid, like amounts, which were to be deducted from the \$500,000 provided for by the act of March 3, 1875, when a channel 26 feet in depth, &c., should have been obtained.

The effect of these provisions was, therefore, to substitute for the payment to be made according to the original act on obtaining the depth of 24 feet, &c., a payment in advance of \$500,000, and a further payment of \$500,000 for materials furnished, &c., which was to be compensated for by the deferred payment of \$250,000 due upon maintaining the depth of 24 feet, and one-half of the payment of \$500,000 due upon obtaining the depth of 26 feet. This being the state of the law, the act of March 3, 1879, provided for a system of payments to be made in lieu of the payments before provided for. From the nature of the case this provision could only affect the payments under the laws of March 3, 1875, and June 19, 1878, when construed together, which were yet to be made. This act of March 3, 1879, is explicit in the statement that nothing in it is to be construed as repealing, or in any wise affecting, the provisions of the amendatory act of June 19, 1878, and that the whole of the act of March 3, 1875, shall be and remain in full force and effect, except so far as it is amended by this act or as previously amended by any other act. The first two payments of \$500,000 each contemplated by the original act of March 3, 1875, had been made. By the express terms of the act of March 3, 1879, the two payments of \$500,000 each contemplated by the act of June 19, 1878, were to be made if they had not already been made. Whether or not they had actually been made at the time of the passage of the act, I am not informed, nor is it important.

This state of legislation shows clearly that the act of March 3, 1879, was intended to operate only upon those payments which were to follow the payments provided for by the act of June 19, 1878. Those payments are: \$250,000 upon obtaining a depth of channel of 26 feet and a width of 300 feet, and \$250,000 additional upon maintaining the same for a year; \$500,000 upon obtaining a channel 28 feet deep and 350 feet wide, and the additional sum of \$250,000 upon maintaining the same for a year; \$500,000 upon obtaining a depth

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of 30 feet with a width of 350 feet, and \$500,000 additional upon maintaining the same for a year; in all, \$2,250,000.

The new system of payments provided for by the act of March 3, 1879, contemplate an immediate payment of \$750,000; upon Mr. Eads obtaining a depth of 25 feet with a width of 200 feet, a payment of \$500,000; at a depth of 26 feet and a width of 200 feet, \$500,000; at a depth of 30 feet, without regard to width, \$500,000; in all, \$2,250,000.

The important change made in favor of Mr. Eads by the passage of the act of March 3, 1879, is not in the amount of the payments. The total amount contemplated by the original act of March 3, 1875, by the act of June 19, 1878, and by the act of March 3, 1879, is the same; but he obtained by the latter act the important advantage of having an immediate payment of \$750,000, a payment of \$500,000 upon obtaining a depth of 25 feet and a width of 200 feet, \$500,000 on obtaining a depth of 26 feet and a width of 200 feet, and \$500,000 on obtaining a channel 30 feet deep without regard to width. The great advantage is obvious; and there will remain yet to be paid to Mr. Eads only the sum of \$500,000 under the law as it now stands, after he shall have been paid for the 26 feet channel—the sum due upon the completion of the work. He, however, is still entitled, of course, to the \$100,000 a year and the million dollars provided for in the original act for maintaining the 30-foot channel for twenty years. The act of March 3, 1879, provides that payment thereof shall be made at the times and in the manner specified in the original act.

While the act of March 3, 1879, is explicit in its statement that nothing therein contained is to affect or repeal in any way the provisions of the act of June 19, 1878, and while the act of June 19, 1878, does contemplate that the sum of \$250,000 is to be deducted from the payment to be made upon obtaining a depth of 26 feet, yet when an entirely new system of payments is adopted, which, in the aggregate, equals the balance of the payments, omitting that \$250,000, it must be deemed that that provision has now no payment to operate upon, or which can be affected by it, the whole of the payments provided in the act of March 3, 1879, differing both in amounts and character from those contemplated when the act of June 19, 1878, was passed, and those which were contem-

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plated under the act of March 3, 1875, when the act of 1878 was passed.

Were the construction otherwise, the compensation of Mr. Eads would be reduced by the sum of \$250,000 from that contemplated by both the preceding acts. Every portion of the act goes to show that such a construction would be inadmissible.

In direct answer, therefore, to your inquiry, I would reply that, assuming Mr. Eads to have obtained a channel of 26 feet in depth and 200 feet in width through the South Pass of the Mississippi River to the deep water of the Gulf of Mexico, including the requisite depth in the pass and over the shoal at the head of the pass, and to have complied in all other respects with his contract, I am of opinion that he is entitled to receive the sum of \$500,000.

On examining the papers handed to me by you, I observe a letter from the Chief of Engineers, in which he withdraws the opinion heretofore expressed by him, that Mr. Eads should receive only \$250,000.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. GEORGE W. MCCREARY,
Secretary of War.

CASE OF GEORGE H. GIDDINGS.

By act of March 3, 1879, chap. 182, an appropriation of a certain amount was made "to pay George H. Giddings, late contractor, for one month's extra pay on discontinuance of a portion of route numbered 8,076, Texas, which went into effect July 1, 1861, in accordance with the opinion of the Attorney-General." Subsequently one D., claiming a right to a portion of the fund thus appropriated, filed a bill in the supreme court of the District of Columbia against the said Giddings, upon which an order was issued by the court forbidding him to meddle with the fund, and appointing a receiver to obtain and hold the same subject to the order of the court. A warrant having been issued for the payment of the amount to Giddings pursuant to the terms of the statute, the receiver made application to the Postmaster-General for the delivery of the warrant to him. *Advised* that the payment cannot properly be made to any other than the person designated by Congress to receive it; that after such action by Congress, the Executive Depart-

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ments ought not to submit to the courts, upon any ground of comity, the question as to who should receive the fund; and that the application should be denied.

DEPARTMENT OF JUSTICE,

July 11, 1879.

SIR: Your letters of the 23d and 24th ultimo submit for my consideration and advice certain papers relating to the claim of Robert E. Doyle and John T. Doyle against George H. Giddings and others.

The facts appear to be as follows:

On the 3d day of March, 1879, Congress passed an act making an appropriation of \$14,583.33 to George H. Giddings, to satisfy the amount of damages due him for discontinuance of a contract entered into by him with the United States in 1858.

A warrant was issued under the provision in this act embraced in the following words:

"To pay George H. Giddings, late contractor, for one month's extra pay on discontinuance of a portion of route numbered eight thousand and seventy-six, Texas, which went into effect July first, eighteen hundred and sixty-one, in accordance with the opinion of the Attorney-General, fourteen thousand five hundred and eighty-three dollars and thirty-three cents."

The one month's extra pay provided for in this act was based upon a provision contained in the original contract, and is regarded in the nature of liquidated damages.

Since the passage of the act referred to, the Doyles have set up a claim to a portion of this fund, and have filed a bill in the supreme court of this District in order to obtain possession thereof. Upon this bill an injunction has been issued by the said court forbidding Giddings and one White, to whom he had transferred the fund, from meddling with it, and appointing a receiver, who is to hold the fund subject to the order of the court.

A request has been made of yourself by the receiver that you turn over to him the warrant in question, thus submitting it to the adjudication of the court; and it is claimed that, as a matter of comity, it is due to the judicial branch of the Government that this should be done.

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It is not understood by me that any claim is made that the injunction in question, or that the order of the court appointing the receiver, could operate upon yourself or your Department, except by consent. That this is so is beyond controversy, for it has been repeatedly held that in regard to the performance of their administrative duties the Departments are not subject to the direction of the courts. The claim is of a different character, and is based only upon the ground that that which cannot be legally required of you may be required as a matter of duty arising out of the relations of comity which should exist between the different branches of the Government. But if it is the duty of a Department to yield, as a matter of comity, its administrative function to the control or direction of the judicial branch, it surrenders them as completely as if it were its legal duty to make such surrender and obey judicial orders and decrees having relation to them. The necessities of the Executive Departments of the Government are to be judged of by themselves, and jurisdiction which is not conferred by law upon the judicial branch should not be conferred by consent of Departments. Whenever Congress deems it necessary, to a greater or less extent, to subject the Executive Departments to judicial inquiry or decree, it will make an appropriate law for that purpose; but while it leaves them in the exercise of their functions an independent branch, it seems to me that the appropriate duty of officers at their heads is to thus direct them.

Undoubtedly instances can be imagined where it would be convenient to have the aid of the judicial system in order to test the various and conflicting rights of parties who may have opposing claims before a Department to the same fund, and cases may be conceived where it would be advisable to delay the decision of the Department until the views of the court were known as to legal questions; but it cannot be admitted as a principle that comity requires that Departmental officers should wait until courts have made adjudications of those questions which are submitted by law to Departmental direction.

In the present case there is also another answer to your inquiry, which seems to me to be complete. The appropria-

 Light-house at Great Beds, Raritan Bay.

tion out of which the controversy arises was specifically named by Congress in favor of George H. Giddings. It was for that body to determine whether any one should have an appropriation for the discontinuance of the contract out of which the claim grew, and also who should receive such appropriation. This determination it made by the words of this appropriation. It left to the Departments no important duties of administration, but only duties in their nature essentially ministerial. All that they had to do in the matter was to settle the claim according to the forms of law and the practices of the Departments, upon the necessary vouchers. It was not for them after such legislation by Congress, it seems to me, to submit to the courts upon any ground of comity the question as to who should receive the fund. This is already a *res adjudicata* by the body which had the control of granting or withholding the appropriation.

Your letter further submits to me a question arising from the fact that Messrs. Carpenter, Blackburn, and Lamon have filed in the Department certain papers setting up a lien upon said fund for fees due them as attorneys for Giddings.

No legal right of lien has been established by such attorneys against this fund. The Treasury Department has prescribed certain rules intended to protect attorneys of record. If these rules have been complied with on the part of said gentlemen, it is to be supposed that the regulations of the Treasury will also be carried out so far as they are intended to aid attorneys in the collection of their just dues; but I do not perceive that any duty devolves upon you in this matter.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. DAVID M. KEY,
Postmaster-General.

 LIGHT-HOUSE AT GREAT BEDS, RARITAN BAY.

It is not competent to the Light-House Board to erect a light-house on Great Beds, Raritan Bay (for the establishment of which provision is made by the act of June 20, 1878, chap. 359), until title to the sites, though located under navigable waters of the United States, has been obtained for the Government.

Light-house at Great Beds, Raritan Bay.

The proprietorship of the soil under such waters, within the territorial limits of a State, belongs absolutely to the State, subject only to the rights surrendered by the constitution to the General Government.

Where lands of that description are needed to enable the General Government to perform its proper functions (as, *e. g.*, to establish light-houses), it may appropriate them for that purpose. This it may do, not by virtue of any ownership in the soil, but by virtue of the right of eminent domain.

That mode of acquiring lands (by the exercise of the right of eminent domain, which calls for a judicial proceeding) can be resorted to only in cases where provision is made therefor by statute.

DEPARTMENT OF JUSTICE,
July 30, 1879.

SIR: By your letter of the 21st ultimo, and the accompanying papers, it appears that the site for the proposed light-house at Great Beds, in Raritan Bay (for the establishment of which an appropriation was made by the act of June 20, 1878, chap. 359), is located on a shoal under the waters of that bay; that this site "is as to the right of property within the territorial limits of the State of New York, as defined by the treaty between the States of New York and New Jersey made September 16, 1833, but that the jurisdiction of the State of New Jersey by said treaty extends over and embraces the location"; that the State of New Jersey has already ceded to the United States jurisdiction over it; and that the Light-House Board inclines to the view that, the site being located within navigable waters of the United States, the title thereto is for that reason in the United States, and that the board may erect a light-house thereon "without taking further action to obtain title."

At the suggestion of the board, you request an opinion upon the question "whether it is not competent to the Light-House Board to erect the light-house authorized by Congress on Great Beds, Raritan Bay, without taking further action in reference to obtaining title, on the ground that the title to the site in question is already in the United States."

The view of this subject entertained by the Light-House Board appears to rest upon certain general expressions used by the Supreme Court when considering the authority of Congress over navigable waters of the United States derived under the constitutional grant of power to regulate commerce,

Light-house at Great Beds, Raritan Bay.

and also upon language of like character employed in an opinion of one of my predecessors (dated September 20, 1875) touching the right to establish range-lights in the waters of Saginaw River. But neither in the opinion just adverted to nor in any of the decisions of the Supreme Court is it declared that the ownership of the soil under navigable waters of the United States, within the territorial limits of a State, belongs to the General Government. On the contrary, that court has laid down the doctrine that the shores of navigable waters, and the soils under them, are not granted by the Constitution to the United States, but are reserved to the States respectively (*Pollard's Lessee v. Hagan*, 3 How., 202), and that the proprietorship of such shores and soils belongs absolutely to the States, subject only to the rights surrendered by the Constitution to the General Government (*Martin v. Waddell*, 16 Pet., 367); and this doctrine has been reaffirmed by the same court in the recent case of *Barney v. Keokuck*, 94 U. S. Rep., 324.

Thus the proprietorship of the shores and beds of navigable waters within the limits of a State must be regarded as vested in the State, and not in the United States. In the exercise, however, of the power to regulate commerce granted by the Constitution, the latter may restrict the use of such shores and beds; and where lands of this description are needed to enable the General Government to perform its proper functions (as, for instance, to establish light-houses) it may appropriate them for that purpose. But this it may do, not by virtue of any ownership in the soil, but by virtue of the right of eminent domain—a right distinct from and paramount to the right of ownership—which exists in the General Government, and can be exercised by it within the States so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution. (*Kohl v. United States*, 91 U. S. Rep., 367.) Yet this mode of acquiring lands (viz, by the exercise of the right of eminent domain, which calls for a judicial proceeding) is to be resorted to only in cases where provision is made therefor by statute.

By the general law, it seems, the title to the site under consideration, which would appear now to belong to the State of New York, must be acquired before a light-house can be

Sewer across White Lot—Disposal of Surplus Earth.

erected thereon. (Rev. Stat., secs. 355, 4660.) Though no objection might be made by the State authorities to the occupancy of the land by the Light-House Board for that purpose without first obtaining a grant from the State, such a course is forbidden by the requirements of the law referred to.

In direct answer to your inquiry, I have the honor to submit that, the title to the site in question being, as is above shown, not already in the United States, it is not competent to the Light-House Board to erect the light-house thereon without taking further action in reference to obtaining title.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Acting Attorney-General.

Hon. JOHN SHEERMAN,
Secretary of the Treasury.

SEWER ACROSS WHITE LOT—DISPOSAL OF SURPLUS EARTH.

Under the provisions of the contract of Messrs. Coyle & Co. with the Commissioners of the District of Columbia, to construct a sewer running from the Potomac River across the White Lot and then along the line of certain streets, &c., in Washington, D. C., the contractors are entitled to the surplus earth (excavated along the line of the sewer) which remains after the sewer is laid and the trench has been filled so as to restore the original level.

DEPARTMENT OF JUSTICE,
August 1, 1879.

SIR: In reference to the issue betwixt Colonel Casey, in charge of public buildings and grounds, and Messrs. B. J. Coyle & Co. as to the disposal of the "surplus" earth arising in the construction of a sewer crossing the White Lot—as to which it was understood orally a day or so since that I would address to you a written memorandum—allow me to say:

Messrs. Coyle & Co. are contractors with the Commissioners of this District to construct a sewer running from the Potomac River across the White Lot, and thence along the line of certain streets and avenues of this city. It is admitted that the Commissioners received whatever license was necessary to give the right thus to traverse the White Lot.

Sewer across White Lot—Disposal of Surplus Earth.

The contract contains provisions for refilling the trench after the sewer is laid, and in connection therewith stipulates as follows :

"2. Should there be a deficiency of proper material for refilling, the contractor will be required to furnish the same at his own cost, *and all surplus, if any, will be hauled away.*"

The White Lot is in the course of being raised and graded by the United States. For this purpose heretofore and now earth has been and is being purchased and brought from other places. Some of the earth excavated along the line of the sewer and now forming *surplus* is part of what has been so purchased and deposited.

In this state of things Colonel Casey submits on behalf of the United States that the surplus earth belongs to them, and that the Commissioners have no authority to dispose of it as above ; the contractors claim it as theirs under the above provision.

Upon reflection, it seems to me that the United States must be taken as having authorized the above contract *in its very terms*. The provision in question is the ordinary one in such cases ; and in cities where (as here) such *surplus* has a market value it is counted upon as part of the consideration received by the contractor. What the owners of the ground traversed require is that no scar shall be left upon its surface. The trench must be "filled and rammed," and then the "*surplus* hauled away," so as to restore the original level. It is plain that the surplus is the contractor's, to do as he pleases with, so that he causes it to be hauled away. It also follows that if the true owner of the ground traversed under the circumstances of this case makes no objection to such a clause in the contract he consents thereto, and professes to regard such surplus as a nuisance, and to require that it be removed from the land. It appears to make no difference whether the *surplus* consists of earth formerly bought *by the cart load or by the acre*. It has been universal, as I learn, for the United States to consent to such provisions in contracts by the city authorities for grading the streets and avenues of Washington, the soil of which belongs to them. The only substantial distinction which is suggested between that case and this is that the Commissioners had no authority to traverse the White

National Home for Volunteer Soldiers.

Lot *without special permission*. It would follow, therefore, that after such permission had been obtained (as here) all distinction ceased.

I therefore submit that Messrs. Coyle & Co. are entitled to the *surplus earth* claimed by them.

Very respectfully, your obedient servant,

S. F. PHILLIPS,

Acting Attorney-General.

Hon. GEORGE W. McCRARY,

Secretary of War.

NATIONAL HOME FOR VOLUNTEER SOLDIERS.

The assignment of his pension certificate by an inmate of the National Home for Volunteer Soldiers, under section 4832 Rev. Stat., does not give to the managers of that institution a right to collect or receive the pension therein mentioned for any period of time other than that during which he remains an inmate of the Home or receives its benefits. The Home is not authorized to collect or receive arrearages of pensions under the act of January 25, 1879, chap. 23, either on assignment or otherwise.

Payment of arrears of pension to the Home for prudential or other reasons, except when made in accordance with law, will not relieve the Government of its obligation to the pensioner. Assignments not warranted by special enactment are forbidden by section 4745 Rev. Stat.

DEPARTMENT OF JUSTICE,

August 19, 1879.

SIR: Yours of the 12th instant, calling attention to the provisions for assignments from inmates of "The National Home for Volunteer Soldiers," by section 4832 of the Revised Statutes, states that doubts have arisen whether such provisions include arrears of pensions that may be due to such inmates under the pension act of January 25, 1879, chapter 23. In this connection you transmit a form used by the managers of the Home for the assignments of pensions due to inmates, and upon the whole matter ask the following questions:

First. Does the assignment to the Home by the pensioner of his certificate of pension, as provided by section 4832 Revised Statutes, give to the managers thereof the right to collect or receive the pension therein mentioned for any period of time other than while he is an inmate of said Home?

National Home for Volunteer Soldiers.

Second. Is the Home entitled to collect or receive arrears of pension due to the inmates thereof, on assignments or in any other manner, upon blanks like the one herewith transmitted or similar thereto, whether such assignments have been heretofore or shall hereafter be made?

Third. If payment of arrears of pension, for prudential reasons or otherwise, be made to the Home, due to an inmate thereof, will such payment relieve the Government of its obligation to such pensioner?

The provision in section 4832, above referred to, is as follows: "And such of those (officers and soldiers, &c.) as have neither wife, child, nor parents dependent upon them, becoming inmates of this Home, or receiving relief therefrom, shall assign thereto their pensions, when required by the board of managers, during the time they shall remain therein or receive its benefits."

In order that this section should have its appropriate force, it must be construed as an exception to the general provisions of section 4745, which forbid any assignment of pensions.

The material part of the "form of assignment" is as follows: "I, &c., &c., a pensioner of the United States, certificate No. 69494, &c., &c., do hereby transfer to the National Home for Disabled Volunteer Soldiers my pension certificate and the moneys secured thereby, and I do hereby authorize and empower the treasurer of said Home to draw the said moneys, and to hold and dispose of the same, subject to the laws of Congress, and the rules, regulations, &c., by the board of managers of the said National Home," &c.

The pension act of January 25, 1879, gives to persons entitled to pensions under former legislation certain arrears which frequently apply to periods of time anterior to that at which present inmates of the Home were admitted therein.

A principal difference between the above statutory provision for the assignment of pensions by inmates of "The National Home for Disabled Volunteer Soldiers" and the provision for a like assignment by inmates of what is known as "The Soldiers' Home" (for regular soldiers, Rev. Stat., sec. 4820) is that the latter is imperative, whilst the former is to be made only "when required by the board of managers."

National Home for Volunteer Soldiers.

The form of assignment presented to me refers to a particular pension certificate, and assigns only that and the moneys due thereunder. It follows, as a matter of course, that it does not extend to pensions and moneys due under a later certificate, and therefore that it does not authorize the Home to draw the arrears now under consideration. But while forms of assignment heretofore required may not extend to authorize the Home to receive the arrears, it may be that persons entitled to such arrears may still be required to assign them. The appropriate subject of inquiry, therefore, is whether assignments of arrears may now be required by virtue of section 4832.

That which soldiers may be required by the board of managers of "The National Home for Disabled Volunteer Soldiers" to assign is "their pensions during the time they shall remain therein or receive its benefits." This expression limits the extent to which the pension is to be assigned, and the more obvious meaning of the sentence appears to be that the current pension is to be assigned for the period during which the pensioner continues to be an inmate of the Home or to receive its benefits. No argument can be drawn from the general legislation upon the subject of these Homes to control this meaning.

An examination of sections 4832 and 4820 Revised Statutes, as well as the provisions of the act of March 3, 1875, "making appropriation for the legislative, executive, and judicial expenses of the Government," as found on pages 359-60 of the 18th Statutes at Large, relating to the future support of the National Home, clearly shows that Congress did not intend that pensions of inmates of the National Home should become a part of the ordinary receipts of the institution, and be applied accordingly. In this important respect the legislation referring to this Home and to the Soldiers' Home (for regulars) differs materially. The Soldiers' Home carries the pensions received to the credit of the ordinary fund, and expends them for the general purposes of the institution. The National Home, on the contrary, keeps such receipts apart, and applies them to the special purposes of the pensioner, and retains the balance in the form of United States registered four per cents in trust for him. (See Annual Report, Ho. Doc. 1877-'78, miscellaneous, 3d vol., No. 49.)

National Home for Volunteer Soldiers.

The provision of law gives to the managers discretion both as to making such requirement and as to the point of time during the connection of the pensioner with the Home when it is to be made. The managers may waive the requirement at the time of admission, and thereupon enforce it at any time afterwards. It is to be deemed a provision intended for the purpose of a paternal administration of a fund which the necessities of the pensioner at present do not require, and which the habits of life of a gallant and deserving but sometimes improvident class of men may impel them to abuse and waste. But its object is sufficiently met when it is provided that the managers may thus administer the current proceeds to which the pensioner is entitled. This apparently would give to them all the control which any purpose of discipline would demand. No one would contend for a moment that if a legacy were left to a pensioner it could be administered or controlled by the managers; and when a new grant by Congress gives, as an additional bounty, the payment to a pensioner of arrearages which may have occurred long before he became an inmate of the Home, it would not seem that it was intended to extend over this fund, by reason of the fact that a pensioner was an inmate of the Home, a guardianship inconsistent with his absolute enjoyment of it.

I therefore answer your questions above noted as follows:

1. The assignment of the pension certificate does not give to the managers a right to collect or receive the pension therein mentioned for any period of time other than while the pensioner is an inmate of the Home.
2. The Home is not authorized to collect or receive arrearages of pensions under the act of January 25, 1879, either on assignment or otherwise.
3. No payment of arrears of pension, for prudential reasons or otherwise, to the Home, except in accordance with law, will relieve the Government of its obligation to the pensioner.

Assignments not warranted by special enactment are forbidden by section 4745 Revised Statutes.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. CARL SCHURZ,
Secretary of the Interior.

Examiner of State Claims in War Department.

EXAMINER OF STATE CLAIMS IN WAR DEPARTMENT.

Section 3 of the act of June 23, 1879, chap. 35, which provides that "the examiner of State claims in the office of the Secretary of War shall have, while on such duty, the pay, emoluments, and allowances of mounted officers one grade higher than that held by him in his regiment or corps," is prospective in its operation, and has no retrospective effect. It entitles the officer described to the pay, &c., therein provided while thereafter performing such duty; but does not entitle him thereto for duty performed prior to the date of the act.

Legislation is to be deemed to be prospective only, unless language be used leading, either directly or by fair inference, to the conclusion that it is to have a retrospective operation.

DEPARTMENT OF JUSTICE,*August 23, 1879.*

SIR: By your letter of the 21st instant you inquire of me "whether the act of June 23, 1879 (section 3), fixes the rate of payment for the services of the examiner of State claims in the office of the Secretary of War during the time he served as such prior to the passage of the act."

Your letter also states:

"In this connection your attention is invited to the matter presented in the inclosed claim, and to the indorsement thereon of the Second Comptroller, and will thank you if you shall be pleased to answer this question at an early date, and to return the papers at the same time."

The section referred to is as follows:

"And the examiner of State claims in the office of the Secretary of War shall have, while on duty, the pay, emoluments, and allowances of mounted officers one grade higher than that held by him in his regiment or corps."

I have read and considered the papers and the brief which accompanied your note, and am of opinion that the act in question does not fix the rate of payment for the services of examiner of State claims in the office of the Secretary of War during the time he served as such prior to its passage. Legislation is to be deemed to be prospective unless language be used leading, either directly or by fair inference, to the conclusion that it is retrospective. The language of the act in question is that said examiner "shall have, while on duty," &c. The operative part of the act is therefore expressed in the future tense; and the words "while on duty" must be

National Board of Health.

construed, in connection with the word "shall," to mean while on duty thereafter. In this respect the act entitles from and after its date the examiner to have, while on duty, the pay, &c., provided by it. I find nothing in it which would justify me in holding that it was to have a retrospective operation, and that under it an officer who previously to the date of its passage had performed the duties provided for should be entitled to receive the pay which was therein contemplated.

I have examined the debates and the history of the legislation connected with this act. From these it appears that an act which would have been retrospective in its operation was presented by the Secretary of War, but that the one in question was substituted for it. This certainly tends to show that the act as passed was not retrospective. On examining the debates it would seem that a difference of opinion was entertained as to the meaning of the act by the Senators who took part. If all who participated had agreed as to the interpretation, it might, in a doubtful case, be that the construction would be aided thereby. But when it appears by examination that there was a difference of opinion as to the meaning and effect of the act, its construction is in no way aided by such debate. Resort must be had to the well-settled legal principles, which lead to the conclusion that it is prospective in its character, and that it has no retrospective effect.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. GEORGE W. MCCREARY,
Secretary of War.

NATIONAL BOARD OF HEALTH.

The National Board of Health can properly pay, from funds under its control, for tents furnished by the War Department as a matter of urgent necessity to the camp which was established at Memphis, Tenn., to prevent the spread of yellow fever to other States.

That board has no power to aid in suppressing yellow fever, except so far as is required to prevent it from being imported into the United States, or from one State into another.

DEPARTMENT OF JUSTICE,
August 26, 1879.

SIR: Your letter of the 9th instant submits for my opinion the question whether the National Board of Health should

pay from funds under its control for tents furnished by the War Department to establish a camp of observation at Memphis, Tenn.

The National Board of Health have no power to aid in suppressing yellow fever, &c., except so far as is required to prevent it from being imported into the United States, or from one State into another. If it were known that the yellow fever at Memphis would spread only through Tennessee, the National Board of Health would have no power to interfere. It is only because this is not known, and because of the threat to the contrary, that this board can spend money aiding State and municipal boards, &c. It is not easy to administer this principle accurately, but an endeavor is made to keep it in view.

For instance, upon an application for rations for the Memphis camp of observation, it was determined that the board should aid for the length of time necessary to keep persons from Memphis under observation before allowing them to go further, and so carry yellow fever to Mississippi or Kentucky, &c. They declined to agree to feed indefinitely, *i. e.*, until Memphis were disinfected, and the ordinary means of making a living restored.

I believe, as a matter of fact, although it is not stated in the papers, that the board have approved of the camp at Memphis as a means of preventing the spread of yellow fever to other States, &c. It follows that they would have aided by paying for tents, &c. I believe this may be assumed.

It seems, in general, that there is, in making such application to the board, a question addressed to their discretion, and that such discretion cannot be exercised by the Secretary of War, or any one else than the board.

I am compelled, therefore, to answer the question submitted by you hypothetically, which I do as follows:

Admitting that the tents in question were reasonably necessary, under the circumstances, to prevent the spread of yellow fever from Tennessee into other States, and the Tennessee State board and local board of Memphis were unable to furnish them, it would have been the duty of the National Board to do so; and, therefore, under the present circumstances, as the Secretary of War has, as a matter of urgent necessity and

Exchange of Gold and Silver for U. S. Notes.

without authority of law, furnished such tents, it is proper that with suitable vouchers the board shall pay therefor.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. GEORGE W. McCRARY,
Secretary of War.

EXCHANGE OF GOLD AND SILVER FOR U. S. NOTES.

The provisions of section 3651 Rev. Stat. in effect prohibit the exchange of gold and silver coin for United States notes by the Treasurer, assistant treasurers, and other depositaries of public funds.

DEPARTMENT OF JUSTICE,
September 19, 1879.

SIR: Yours of the 18th, received this morning, informs me that it is desirable, if the law will permit, that the Treasurer and assistant treasurers of the United States be authorized to exchange gold and silver coin for United States notes. It calls my attention to section 3651 Rev. Stat., and asks whether, in my opinion, that section or any other provision of law prohibits or restricts such exchange.

The section 3651 was originally a portion of the act of 1846 known as "the sub-treasury act." It was re-enacted in 1862, 1863, and 1864, with certain modifications rendered necessary by the adoption of United States notes and national bank notes as a part of the currency of the United States.

All of the section which need be considered is as follows:

"No exchange of funds shall be made by any disbursing officer or agent of the Government, of any grade or denomination whatsoever, or connected with any branch of the public service, other than an exchange for gold, silver, United States notes, and national bank notes; and every such disbursing officer, when the means for his disbursements are furnished to him in gold, silver, United States notes, or national bank notes, shall make his payments in the money so furnished; or when they are furnished to him in drafts, shall cause those drafts to be presented at their place of payment, and properly paid according to law, and shall make his payments in the money so received for the drafts furnished,

Harper's Ferry Property.

unless, in either case, he can exchange the means in his hands for gold and silver at par." The remainder of the section is punitive in its character, and need not be quoted.

The first of these clauses forbids any exchange of funds by disbursing officers or agents of the Government other than an exchange of them for gold, silver, United States notes, and national bank notes, but gives no authority for the exchange of either of these moneys for the others. The second clause makes it the duty of every disbursing officer to pay, when the means for his disbursements are furnished to him in gold, silver, United States notes, or national bank notes, in the moneys so furnished. It treats him not as a debtor to the United States, but as a bailor of the funds of the United States, who is required to pay them out, and necessarily to keep them in the precise form in which he receives them. The third clause contemplates that under certain circumstances (as where drafts are furnished the disbursing officer) he may exchange the means in his hands for gold and silver at par; but no authority is given to make any other exchange.

In view of the fact that the second clause makes it the imperative duty of every disbursing officer to make payments in the moneys which he receives, and that no provision is found permitting him to exchange gold and silver for other moneys, I am of opinion that the clause in question presents an obstacle to your wish to exchange gold and silver coin for United States notes through the depositaries of the United States which cannot be avoided under the present legislation.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. JOHN SHERMAN,
Secretary of the Treasury.

HARPER'S FERRY PROPERTY.

In making abatements, under section 4 of the act of June 14, 1878, chap. 192, of the purchase money due from purchasers of lots of land at Harper's Ferry sold by the Government in November, 1869, the Solicitor of the Treasury is not bound to adopt the present market value of the lots as a standard and abate the original purchase price down to that value.

Harper's Ferry Property.

Yet he has power so to do ; or, if he shall deem a fixed rate of deduction (as one-fourth or one-third of the purchase money) proper, he may make the abatements accordingly.

DEPARTMENT OF JUSTICE,
October 1, 1879.

SIR : Your letter of the 14th of August requests my advice in the construction of the act of June 14, 1878, in relation to relieving the purchasers of lots of landed property belonging to the Government of the United States at Harper's Ferry, W. Va., at the sale of the same on the 30th of November, 1869. It further informs me that the releases provided for by the first and second sections of the act have been executed and delivered to the parties, and that that class of purchasers have been discharged from all liability to the United States on account of their purchases. These are the purchasers who have distinctly relinquished their titles. The abatements provided for in the fourth section of the act have not been consummated on account of the question raised by some of the parties, who claim that by a proper construction of the act the original purchase price of their respective lots should be abated down to their present market value.

You inquire whether under the provisions of said act the rule of abatement should be the present market value of the lots in question, as contended by the applicants through their attorney, or whether I should advise, according to the "principles of law and equity" by which you are to be guided, that you should abate the price of the lots down to the present market value of each separate lot, or whether you should adopt an arbitrary standard of valuation applicable to each and all of them alike.

I have read with great interest the brief submitted by Mr. Pool on behalf of this class of purchasers, and am unable to concur in the view which he takes, that the present market value of the lots in question should be taken as the basis of the settlement made by the United States.

It may well have been that the United States were willing to discharge from their bargain those who desired it ; but it would not necessarily follow that those who concluded to remain in possession were therefore to be entitled as of right to have the bargain which they had previously made treated as

Compromise of Claim to Real Property.

if it were void, and a new bargain made upon the basis of the present value of the lots. If a person had made no improvements and chose to remain upon his lots, he would have no benefit from this act, and would be compelled to pay the full amount of his original purchase money. Those who had made improvements were felt by Congress to be in this position: that while their purchases were of much less value on account of circumstances not necessary now to be detailed, yet they might well desire to hold the lands at a reasonable price by reason of the fact that they had invested in such improvements. What deduction is to be made is to be determined by the Solicitor of the Treasury, it would seem to me, in each individual case. It is probable that the diminution in value of these lands could not have occurred in any fixed ratio. The act gives to the solicitor a very large discretion, and where discretion is so broad it is undoubtedly true that the execution of such an act is difficult. It does not seem to me that he is bound to adopt the rule laid down by the attorney for the claimants, although I think he has power so to do should he consider that rule to be just and equitable. In this view he may abate the price of these lots down to their present market value; or if he shall deem that a fixed standard of valuation—as a deduction of one-fourth or one-third of the purchase money—is proper, he may make such deduction; or if in point of fact the actual possession of the property, or of any part thereof, shall have been of great value during the years that have intervened between the sale and the present time, I can see no reason why he may not fairly take that into consideration in determining the deduction to which the purchaser who desires still to remain the owner is entitled.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. KENNETH RAYNER,
Solicitor of the Treasury.

COMPROMISE OF CLAIM TO REAL PROPERTY.

Certain land in Pennsylvania was set off to the United States on execution against a debtor, over which the Government subsequently exercised acts of ownership by leasing and offering the same for sale. One S. claims title to the land through certain persons who, as is alleged,

Compromise of Claim to Real Property.

owned it previous to the levy on the execution; and, he being in possession, an action of ejectment has been brought by the Government against him, which is still pending. He proposes to compromise by paying to the Government a certain sum, and the United States to abandon the suit and the title to the property. *Held* that section 3469 Rev. Stat. does not confer authority to entertain the compromise proposed.

That section was intended to provide for compromising claims in favor of the United States which are of a personal character. It does not extend to claims to real property to which the United States asserts ownership and has a record title.

DEPARTMENT OF JUSTICE,

October 1, 1879.

SIR: Your letter of August 12, in regard to the proposal made by one Sliney with respect to a certain tract of land situated in Forest County, Pennsylvania, was received, and I regret that my answer has been delayed; but this has been for the reason that the Hon. Harry White, M. C., had expressed a desire to be heard in the matter. As sufficient time has now elapsed, and as no arguments have been filed, I proceed to answer your inquiry.

Without reciting in detail the facts stated in your letter, I understand them to be substantially as follows:

The tract of land in question was set off to the United States on execution against one of its debtors. It has been in charge of the office of the Solicitor of the Treasury as land owned by the United States, and through that office the Government has been in possession and has exercised ownership by leasing and by offering the same for sale. Whether the claims of the United States to, or its possession of, the property were facts known to Sliney, who now claims the land, at the time of his purchase thereof, is a disputed question. His claim of title is through certain persons who owned the land previous to the levy by the United States. An action of ejectment has now been brought against Sliney, who is in possession of the land. He proposes to pay a certain sum, and the United States are to abandon their suit and concede to him the property.

Upon the state of facts as thus recited you inquire whether the section 3469 Revised Statutes confers upon you authority to recommend a compromise in a case of this character. Your

Compromise of Claim to Real Property.

question of course assumes that the circumstances upon which you are authorized to recommend such a compromise, namely, those reported by the district attorney, &c., have occurred. The inquiry then resolves itself into this: Can a claim to real property to which the United States asserts title, and to which it does have a record title, be compromised by payment of money, and the title then abandoned?

The suggestion made in your letters presents a substantial difficulty in entertaining the proposal submitted by Mr. Sliney. What is proposed is in effect an alienation of property to which the United States claims and asserts title, and which is therefore public property if its claim is correct.

The section 3469 is as follows:

“Upon a report by a district attorney, or any special attorney or agent having charge of any claim in favor of the United States, showing in detail the condition of such claim, and the terms upon which the same may be compromised, and recommending that it be compromised upon the terms so offered, and upon the recommendation of the Solicitor of the Treasury the Secretary of the Treasury is authorized to compromise such claim accordingly. But the provisions of this section shall not apply to any claim arising under the postal laws.”

An examination of this section indicates that what is intended to be provided for is a claim of a personal character, as for a debt, or damages, and not an assertion of title to real property in the possession of the United States, and to which it has a record title. The latter clause of the section indicates this, because claims arising under the postal laws (which are excluded from the section) would hardly be other than personal claims. This view is also strongly fortified by the fact that the Solicitor of the Treasury, by section 3749, is authorized, with the approval of the Secretary of the Treasury, to sell at public sale any real property of the United States acquired under judicial process or otherwise, &c. This latter section would seem to give all the authority necessary to the Solicitor of the Treasury, in connection with the Secretary, in his capacity of guardian of the public property which has been obtained in the course of judicial proceedings. It would extend the right of compromise too far

Ice Harbor at Mouth of Muskingum River.

to say that he could in all cases of an assertion of title to real estate transfer the rights of the United States by virtue of a compromise entered into with a person claiming the same. Few titles to real estate are absolutely perfect. An investigation often reveals claims of individuals, either complete or partial, to property which may have been long in the possession of another occupant. If it had been intended that claims of this character should be the subject of compromise by the Solicitor, words more clearly indicating that an actual title to real estate might pass by virtue of the action of the Solicitor would probably have been used.

In direct answer to your inquiry, I therefore am of opinion that the compromise offered by Mr. Sliney cannot be entertained.

Very respectfully,

CHAS. DEVENS.

Hon. KENNETH RAYNER,
Solicitor of the Treasury.

ICE HARBOR AT MOUTH OF MUSKINGUM RIVER.

The Secretary of War has authority under the provision in the act of March 3, 1879, chap. 181, making an appropriation for an ice harbor at the mouth of the Muskingum, in the State of Ohio, to accept the grant made by the legislature of that State of the right to take possession of the dam belonging to the State, without further legislation by Congress. So, also, a grant from the city of Marietta of the use of the adjacent land owned by the city.

The estate which the United States would hold in the dam, by virtue of the grant of the State, would be in the nature of an easement; yet it would be sufficient for the purpose contemplated by the provision aforesaid.

DEPARTMENT OF JUSTICE,

October 4, 1879.

SIR: Yours of August 5, 1879, is before me. It requests my opinion upon certain points in reference to obtaining the real property necessary to the construction of the work on the ice harbor at the mouth of the Muskingum River, Ohio, for which an appropriation was made in the river and harbor act of March 3, 1879.

Ice Harbor at Mouth of Muskingum River.

The Muskingum is an affluent of the Ohio, and its navigation has heretofore been difficult. Improvements for the purposes of navigation have been made upon it by a series of locks and dams at certain intervals between Marietta, at its mouth, and Zanesville, in the State of Ohio. These improvements all belong to the State, and the first dam is near the mouth referred to. Above this dam is a pool of some six miles long, and of sufficient area to form a harbor for all the steamers and barges from the Ohio that may seek this place of refuge from moving ice on the breaking up of the Ohio River in the spring. To make this pool available for such a harbor, a lock is required to permit vessels to pass into it. This lock will necessarily be in the stream or within the banks, and intersect the dam belonging to the State. It is not supposed that any other land than that now under the control of the State will be required for the construction of the lock, but, at any rate, no other land in addition than that under the control of the city of Marietta.

The act of Congress, so far as it concerns this subject, is extremely brief. Its first clause is as follows: "That the following sums of money be, and are hereby, appropriated, to be paid out of any money in the Treasury not otherwise appropriated, to be expended, under the direction of the Secretary of War, for the construction, completion, repair, and preservation of the public works hereinafter named."

After enumerating a large number of such appropriations, the following words are used: "For an ice harbor at the mouth of the Muskingum, Ohio, thirty thousand dollars."

No plan for the construction of this work is indicated by the act. If all the facts were before Congress, it must have been well known that the plan now proposed could not have been carried out without the consent of the State of Ohio, or without a taking of its property by the right of eminent domain for the purpose; and it is probable that it was fully contemplated that a grant would be made by the State of Ohio which would authorize the United States, in the construction of the work, to cross its dam and use so much of it as might be necessary for the purpose proposed. In point of fact, a few days before the appropriation bill was passed

Ice Harbor at Mouth of Muskingum River.

the following joint resolution was passed by the State of Ohio:

"JOINT RESOLUTION granting the Government right of way through certain State works.

"Whereas Congress has now under consideration a proposition to establish an ice harbor at the mouth of the Muskingum River, at Marietta; and

"Whereas the Muskingum River is now controlled by the State of Ohio as one of its public works for the purpose of navigation; and

"Whereas, to facilitate navigation on said river, the State of Ohio has built a dam across said stream which will interfere with the free use of said stream by the General Government for the purpose of said ice harbor without considerable changes in said dam and lock: Therefore,

"Be it resolved by the general assembly of the State of Ohio, That the General Government are hereby granted the right of way through said State works, and are hereby authorized to enter upon the Muskingum improvements, to make such changes in the dam or lock at said point as may be necessary for the construction of said ice harbor: *Provided,* That the rights of the State of Ohio and interests of navigation shall not be interfered with.

"JAMES E. NEAL,

"Speaker of the House of Representatives.

"JABEZ W. FITCH,

"President of the Senate.

"Adopted February 28, 1879."

It further appears that the city of Marietta, subsequently to the appropriation of the act, passed the following resolution:

"Whereas Congress has made an appropriation of \$30,000 towards the construction of an ice harbor at the mouth of the Muskingum River; and

"Whereas in the construction of said work the use of a part of the public ground adjacent to the river bank may be required: Therefore,

"Be it resolved by the city council of the city of Marietta, Ohio, That the Government of the United States be, and it is

Ice Harbor at Mouth of Muskingum River.

hereby, authorized free of cost to possess and permanently use the ground immediately adjacent to the river bank to the extent that may be necessary for the construction of the proposed lock, and also to use free of charge during the construction of the work as much of the public ground adjacent to the river bank as may be required for the storage and working of material to be used in connection with said work."

Your questions assume that the only titles necessary to be considered in connection with the proposed works of the United States are the titles of the city of Marietta and State of Ohio; and these questions are as follows:

"1. Whether this Department is authorized to accept the grant of the legislature of the State of Ohio of the right to take possession of the dam, &c., belonging to the State without further legislation by Congress.

"2. What estate in law would the United States hold therein under said grant if accepted, and should any other estate than one in fee-simple be accepted?

"3. Is the Department authorized to accept the use of the land adjacent to the bank of the Muskingum, alleged to be owned by the city of Marietta?"

1. In answer to your first inquiry, I am of opinion that the Department is free to accept the grant of the legislature of the State of Ohio of the right to take possession of the dam belonging to the State without further legislation by Congress. This question is entirely distinct from the inquiry whether you would be entitled to use any portion of the appropriation for the purpose of such a right. When, however, such a right is granted, it is an aid in the construction of the work that might fairly have been contemplated by Congress would be given by the State. Possibly it may have been known at the time that it had actually been given. The Department is therefore authorized to avail itself of it.

2. The estate in law that the United States would hold in the dam under the grant of the State if accepted would be in the nature of an easement. "Right of way" in the sense in which it is used in the joint resolution must be construed to be a right to maintain the lock across the dam, and for that purpose to use the dam so far as is absolutely necessary; and, further, to permit the passage of vessels through

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the lock and thus through the dam of the State of Ohio. Such a grant, as soon as made and acted upon by the United States by the construction of the lock, could not thereafter be withdrawn by the State of Ohio.

Section 355 Revised Statutes is as follows:

"No public money shall be expended upon any site or land purchased by the United States for the purposes of erecting thereon any armory, arsenal, fort, fortification, navy-yard, custom-house, light-house, or other public building, of any kind whatever, until the written opinion of the Attorney-General shall be had in favor of the validity of the title, nor until the consent of the legislature of the State in which the land or site may be, to such purpose, has been given."

* * * * *

There has been a grant of the legislature in accordance with this section. The estate granted is not one in fee-simple in a strict sense, but it possesses all the important characteristics of the fee-simple. It is a grant which when acted upon is permanent and exclusive. I am therefore of opinion that, although it is not an estate in fee-simple, it gives the United States every right desirable for the purpose for which the lock is to be constructed, and it should be accepted. Many grants are accepted from States for light-houses, custom-houses, and other public buildings limited in their nature to the use proposed, or to public uses, and there is no objection to such acceptance.

3. If the use of the land adjacent to the banks of the river alleged to be owned by the city of Marietta is convenient for the construction of the lock by the deposit of materials, or in any other way, there can be no reason suggested why the grant of the city may not be accepted by the Department, as it is tendered free of cost.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. GEORGE W. MCCREARY,

Secretary of War.

Improvement of South Pass of the Mississippi.

IMPROVEMENT OF SOUTH PASS OF THE MISSISSIPPI.

Whether or not the use of dredge-boats is appropriate and allowable as an "auxiliary" for the maintenance of the channel through the jetties at the South Pass of the Mississippi is a matter for the Secretary of War to determine upon the information and opinion of the officers of the Engineer Corps.

The words "quarterly" and "annual" in the act of March 3, 1875, chap. 134, in their application to the payments to Mr. Eads for maintenance of the channel (after its completion) through the South Pass, have reference to the time during which the completed channel is maintained, excluding from the computation of such time all periods of failure to maintain the channel.

Accordingly, where a quarter (three calendar months), commencing from and after the completion of the channel, had expired on October 9, 1879, during which period the channel was maintained as required by the statute, with the exception of twenty days of failure: *Held* that the quarterly payment provided for by said act was not demandable until October 28, 1879; when (if in the meantime the channel was maintained, but not otherwise) such payment became due.

DEPARTMENT OF JUSTICE,
November 12, 1879.

SIR: I have carefully read your communication of the 7th instant, and, in connection therewith, the argument of the counsel of Mr. Eads.

All the inquiries relate to the law, including amendatory acts, which authorizes Captain Eads and his associates on certain conditions "to construct such permanent and sufficient jetties, and such auxiliary works, as are necessary to create and permanently maintain * * * a wide and deep channel between the South Pass of the Mississippi River and the Gulf of Mexico," and which, on compliance with the conditions set forth, obligate the United States to pay said Eads or his legal representatives certain sums of money.

The first inquiry is as follows: Does the law allow the use of dredge-boats in the "maintenance by said Eads and his associates of a channel through said jetties," or does it require that the channel shall be "maintained by said Eads and his associates by the effect of said jetties and auxiliary works" without the use of dredge-boats?

The question whether under the law dredging is permissible as auxiliary to the general plan of Captain Eads, which

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was that of obtaining and maintaining by the use of jetties, or artificial walls, a navigable channel, has been heretofore considered by the War Department in connection with the inquiry whether the channel might be obtained by the use of such aid; and it was held by the Secretary of War, in conformity with the report of two distinguished officers of the Engineer Corps, that such aid might properly be used by Captain Eads, and that its use would not deprive him of the compensation to which he would otherwise be entitled under the acts of Congress.

I have no reason to question the correctness of this decision; and it seems to me that the principle established by it leaves the inquiry as to the use of dredge-boats in maintaining the channel which has been created one of administration only. The channel is to be maintained "by the effect of said jetties and auxiliary works." If the use, therefore, of dredge-boats is strictly "auxiliary," while the general plan of the proposed improvement of Captain Eads is preserved, such use should not prevent him from receiving his compensation.

On reference to the report of the special commission, of date January 13, 1875, included in the report of the Chief of Engineers (Report of Secretary of War, vol. 2, part 1, 1875-'76), it will be seen that the use of dredge-boats as an auxiliary was contemplated. I refer also to the report of Generals Barnard and Wright. (Ex. Doc., H. R., No. 37, Forty-fifth Congress, second session.)

It would seem, from an examination of the various reports upon this subject, that it was contemplated that in order to preserve the channel which would be obtained extensions of the jetties themselves might from time to time become necessary during the period in which Captain Eads was to maintain the channel.

It is therefore a question whether or not the use of dredge-boats in this connection was appropriate as an auxiliary in the plan of Captain Eads as adopted by Congress in the acts authorizing the improvement of the Mississippi River. This question is one which the Secretary of War will of course determine upon the information and opinion of the officers of the Engineers Corps. In such determination I can render him no assistance.

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The second, third, and fourth questions (which may be conveniently considered together) are as follows :

2. Under the circumstances stated in the engineer's certificate of October 15, 1879, herewith, are the legal conditions in reference to maintenance of the specific channel so far complied with as to legally deserve a quarterly payment for maintenance of the channel ?

3. What is the meaning of the law wherein it says the hundred thousand dollars "shall be paid in equal quarterly payments during each and every year," and wherein it further says, provided that "no part of such annual compensation shall be paid for any period of time during which the channel of said pass shall be less" than the required depths and widths ?

4. In the event that the maximum channel required by law has not been maintained during the twenty days specified in Captain Brown's report, can payment be made for maintenance during the remainder of the quarter ?

The report of the engineers shows that there was a period of twenty days during the then current quarter when the required depths and widths of channel were not maintained. It is conceded by the counsel for Captain Eads that for that period he is not entitled to receive the quarterly compensation provided for by the act. But his contention is that he is entitled to receive at the end of the quarter such compensation, deducting therefrom the proportion which twenty days bears to the whole quarter.

One proviso in relation to payments for maintaining the channel is as follows :

"Provided, however, That no part of such annual compensation shall be paid for any period of time during which the channel of said pass shall be less than thirty feet in depth and three hundred and fifty feet in width, as hereinbefore specified."

The depths and widths have been changed by subsequent acts ; but any inquiry growing out of such change is not relevant to our present examination.

On examining a subsequent section, which provides for payment of expenditures in excess of annual payments where Captain Eads shall make satisfactory proof that such ex-

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penditures have been made, is found this clause: "And such payments shall be made from the five hundred thousand dollars to be released at the end of ten years before any payment shall be made from the five hundred thousand dollars to be released at the end of twenty years; and if any failure to maintain said channel of thirty feet in depth and three hundred and fifty feet in width shall occur, the date for releasing the said money held in pledge shall be postponed for an equal period of time, *and the compensation for maintaining said channel shall cease until said depth and width shall be again restored, the maintenance of a channel of thirty feet in depth and three hundred and fifty feet in width for twenty years, exclusive of all such periods of failure, being intended by this act.*"

It will be observed that the plan for compensation to Mr. Eads for maintaining the channel was by a system of quarterly and annual payments for a period of ten years, when a certain sum of \$500,000 was to be released to him, and subsequently, upon the maintenance by him of the channel for an additional period of ten years, he receiving certain quarterly and annual payments, at the end of that time another \$500,000 was to be released to him. The sum of a million dollars was thus, as it were, kept in pledge by the United States for the performance by Captain Eads of his full contract, which was to maintain, as well as obtain, the channel proposed by the act. On examining these provisions together, the plan is shown to be one in which the ten years was not to be held to have expired by the expiration of ten calendar years from the time of obtaining the channel. When, therefore, the meaning of quarterly and annual payments is to be considered, it is to have reference to the periods during which the channel is maintained. If there is a period in any quarter, or in any year, during which the channel is not maintained, that period is not only to be deducted in the quarterly or annual payment, but the quarterly or annual payment is to be postponed by reason of such non-maintenance. In this mode the expiration of the ten years is necessarily postponed by a time equal to those periods during which the channel is not maintained, and Captain Eads is not only subject to the deduction (which it is agreed by his counsel ought properly to be made) of the time during which the channel is not main-

 Desertion from the Army.

tained, but also to a corresponding postponement of his payments.

To apply this principle (which an examination of the whole act, as well as of the provisions to which I have been particularly referred, satisfies me is correct) in the present case: As there were twenty days during a quarter when the channel was not maintained, the time when Captain Eads is to receive the quarterly payment is to be postponed for twenty days. He will then receive a full quarterly payment. No deduction will be made excepting that which is involved in the fact that he receives no money for the time when the channel was not maintained. His quarterly payment would have become due on October 8, 1879, but during twenty days he was entitled to no payment. The payment must therefore be postponed until the 28th of October, when, if he shall then have maintained the channel for a quarter, exclusive of the periods of failure, he will then be entitled to the quarterly payment.

The words "quarterly" and "annual," in their application to the payments, are thus construed with relation to the time during which the channel is maintained; and such construction is clearly necessary in order to meet the exigency of that portion of the statute which requires the release of the money held in pledge to be postponed for a period of time equal to that during which the requisite depths and widths were not maintained.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. GEORGE W. McCRARY,
Secretary of War.

 DESERTION FROM THE ARMY.

Opinion of October 16, 1878 (see *ante*, page 170), relative to trial and punishment by court-martial of deserters from the military service (in which the conclusions of Attorney-General Taft, in the opinion given by him on that subject, dated September 1, 1876, were restated and concurred in), reaffirmed.

- DEPARTMENT OF JUSTICE,
 November 25, 1879.

SIR: I have the honor to acknowledge the receipt of your letter of the 17th instant, in which you inclose a copy of a

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letter of the 13th instant, from the board of commissioners on the military prisons, giving their views relative to the liability of deserters to trial and imprisonment when they have been beyond military jurisdiction for more than two years.

You inquire whether the forty-eighth Article of War, alluded to by the commissioners, makes necessary any change in my opinion heretofore rendered to you upon the subject.

You refer, I presume, to the opinion of October 16, 1878 in which (after restating the conclusions of my immediate predecessor in an opinion rendered by him to the War Department September 1, 1876, in which conclusions I concurred) I answered the questions put to me in your letter of the 25th of September, 1878.

Upon examination of these opinions, I find that in both the forty-eighth Article of War was duly considered in connection with the one hundred and third Article and with other penal provisions contained in the Articles of War.

With entire respect for the views of the distinguished officers who constitute the board above mentioned, I fail to see any good reasons for modifying or changing the conclusions reached in the two opinions above referred to.

Very respectfully, your obedient servant,

CHAS. DEVENS.

HON. GEORGE W. MCCRARY,
Secretary of War.

MINNESOTA RAILROAD LAND GRANT OF JULY 4, 1866.

Patents may be issued to the State of Minnesota, under the land-grant act of July 4, 1866, chap. 163, for lands opposite that part of the railroad line from Houston, &c., to the western boundary of the State which has been constructed in ten-mile sections since February 26, 1877 (the date at which, in the event the railroad was not completed, it was provided by section 4 of said act that the lands not patented should revert to the United States), no action, legislative or judicial, having been taken to revest the lands in the United States.

The provision in that section, adverted to, is a condition subsequent, and does not work a forfeiture of the grant and revest the lands in the United States until proceedings, either legislative or judicial, are had to enforce it.

A location of said railroad line was made in 1866, after the passage of said land-grant act, and maps thereof were transmitted by the Gov.

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ernor to the Secretary of the Interior in December of that year. The act of the State legislature accepting the grant was not passed until February 25, 1867, and it required the line to be run to Fremont and thence to Jackson, which involved a deviation from the location of 1866. The constructed road deviates from that location only to such extent as was necessary to conform to the requirement of the last-mentioned act. *Held* (1) that the road cannot be regarded as having received an official definite location until after the act of acceptance, which required a modification of the original location; (2) that the Secretary of the Interior should accept proof of the construction of the road upon the line as modified in accordance with the act of acceptance.

DEPARTMENT OF JUSTICE,
November 29, 1879.

SIR: Your letter of February 19, 1879, informs me that by an act of Congress approved July 4, 1866 (14 Stat., 87), there was granted to the State of Minnesota certain lands to aid in the construction of a line of railroad from Houston through the counties of Fillmore, Mower, Freeborn, and Faribault, to the western boundary of the State. This grant was accepted by the legislature of the State of Minnesota, February 25, 1867, and the lands in question granted to the Southern Minnesota Railroad Company. Maps of the definite location of this road were approved by the board of directors of the company, and filed in the General Land Office, as follows: From a point in township 104, range 8 west, to a point in township 103, range 18 west, adopted by resolution of the board of directors of the company January 1, 1867, received at the General Land Office February 18, 1867. From a point in township 103, range 18 west, to a point in township 104, range 37 west, adopted by resolution of the board of directors November 29, 1866, and received at the General Land Office December 10, 1866. From a point in township 104, range 37 west, to a point in township 104, range 39 west, adopted by resolution of the board of directors October 24, 1866, received at the General Land Office December 10, 1866. From a point in township 104, range 39 west, to the western boundary of the State. Survey ordered by resolution of the board of directors December 2, 1869, and the map received at the General Land Office May 4, 1871.

The company constructed the road from Houston to Winnebago City, in township 104, range 28 west, prior to February

Minnesota Railroad Land Grant of July 4, 1866.

25, 1877, at which date, in the event of a failure to complete the road, it was provided that the lands granted and not patented should revert to the United States. (See the proviso to the fourth section of the act of July 4, 1866, above mentioned.)

By an act of the legislature of the State of Minnesota, approved March 6, 1878, all the lands, rights, powers, and privileges granted to and conferred upon the State of Minnesota by the act of Congress approved July 4, 1866, appertaining to the uncompleted line of road of the Southern Minnesota Railroad Company (viz, the line from Winnebago City to the western boundary of the State), were granted, transferred, and vested in the Southern Minnesota Railway Extension Company, under certain conditions, among others that the road should be constructed to the village of Jackson, in Jackson County, before the end of the year 1879, and to the west line of the State before the end of the year 1880.

The Department of the Interior is in receipt of a map, and accompanying evidence, establishing the fact that the Southern Minnesota Railway Extension Company, between April 16, 1878, and December 2, 1878, constructed a line of railroad from Winnebago City (the western terminus of the road constructed prior to February 25, 1877) to a point in township 102, range 35 west, in Jackson County, a distance of forty-three continuous miles of road.

From Jackson to the western boundary of the State is a distance of nearly one hundred miles; and under the act of the Minnesota legislature approved March 6, 1878, the road must be completed to the west line of the State before the end of the year 1880.

It appears by your letter that the governor of Minnesota has filed with the Department a request for a patent to the State of the lands granted, opposite the four sections of constructed road of ten consecutive miles each, between Winnebago City and the village of Jackson, in Jackson County, as provided in the fourth section of the granting act. You state that you have hesitated to comply with this request, as the time provided in the granting act for the completion of the road expired February 25, 1877, ten years from the date of the acceptance of the grant by the State of Minnesota.

Minnesota Railroad Land Grant of July 4, 1866.

The line of road constructed in the year 1878 by the Southern Minnesota Railway Extension Company deviates from the line of definite location of the road adopted by the board of directors of the Southern Minnesota Railroad Company November 29, 1866. At Jackson, the western terminus of the road, the variation is ten miles. East of that point, and between the same and Winnebago City, the variation is from one to six or eight miles from the line as located in 1866.

It will be observed that the granting act only designates through what counties the road shall pass east of and including Faribault County.

In view of these facts, you submit to me the following questions:

"1. Is this Department authorized, under the law, to issue patents to the State of Minnesota for the lands opposite that portion of the road constructed in sections of ten consecutive miles each since February 25, 1877, the date at which, according to the fourth section of the act of July 4, 1866, it was provided, in the event that the road was not completed, that the lands not patented should revert to the United States?

"2. Should the Department accept proof of the construction of the road on a line different from the one originally adopted and approved, if constructed within the limits of the grant as first located?"

1. *As to the effect of the proviso to the fourth section of the act of July 4, 1866.*

While the part of the road to which your inquiries relate was not completed within the time limited by law, no attempt has been made to enforce any forfeiture of the lands granted to the State of Minnesota, or by any means, legislative or other, to revest the title in the United States. The question whether the State of Minnesota may still claim under the act of Congress lands which have been earned by the construction of the road since the expiration of the period is determined by the case of *Schulenberg v. Harriman* (21 Wall., 44). This was the case of a grant of lands to the State of Wisconsin to aid in the construction of a certain railroad within that State, by an act of June 3, 1856. The language there used in reference to the condition upon which the grant might be defeated by non-completion of the road within ten

Minnesota Railroad Land Grant of July 4, 1866.

years was as follows: "No further sales shall be made, and the lands unsold shall revert to the United States." The road had not been completed within the time required for its construction, which had not been extended; and Congress had passed no act, nor taken any judicial proceeding, to enforce any forfeiture of the grant for failure to construct the road within the period prescribed. Upon this state of facts, it was held that a present interest was passed by the grant to the State of Wisconsin; that the proviso was in the nature of a condition subsequent; that the prohibition against further sales if the road were not completed added nothing to the force of the proviso, because a cessation of sales was necessarily implied in the condition that the lands should revert, but that if the condition were not enforced the power to sell continued as before its breach, limited only by the objects of the grant and the manner of sale prescribed by the act; and that, as no action had been taken, either by legislation or judicial proceedings, to enforce a forfeiture or revest the title in the United States, that title remained in the State as completely as it existed on the day that the title by location of the line of the railroad acquired precision and became attached to the adjoining alternate sections.

In direct answer to your inquiry upon this point, I therefore reply that the Department is authorized by law to issue patents to the State of Minnesota for lands opposite that portion of the road constructed in sections of ten consecutive miles since February 26, 1877, the date at which, according to the fourth section of the act of July 4, 1866, it was provided, in the event that the road was not completed, that the lands not patented should revert to the United States; and this for the reason above stated, that no act, legislative or judicial, has been taken to revest the title of the United States.

Supplementary to this inquiry I perhaps should add that, on examination of the relations between the Southern Minnesota Railway Extension Company and the Southern Minnesota Railroad Company, it appears that the title granted to the old company was forfeited to the State of Minnesota by reason of the fact that the conditions annexed to it were not performed, and that this forfeiture was implicitly asserted in

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the act making a grant to another company. (*Farnsworth v. Minn. and Pacific Railroad Company*, 92 U. S., 50.)

2. *As to the effect of change of line.*

So far as the lands now in question are concerned, it is not important whether the road was completed on the location of 1866 or whether it is completed on the present constructed line, since, under the terms of the grant, precisely the same lands will be found in place within the ten-mile limit in either case. They are alike within ten miles of the location of 1866 and ten miles of the constructed road. The fact that if the constructed line had been the line of original location other lands in addition to these now sought would have been withdrawn from the market cannot affect the question of the right to these lands, which actually were withdrawn from the market. How far a railroad is authorized, after having made and filed a map of its location, to change such location and build upon a new and different line does not seem necessary to be considered in the present case. The facts in the present case, as they appear from your statement and an examination of the legislative act, indicate that there was no proper location by which the road, or any other parties interested, could be bound until after the act of the State legislature of February 25, 1867. A location was made in 1866, after the act of Congress had been passed granting the lands to the State of Minnesota, but before the legislature had accepted the trust connected with the land grant. That location is what is termed the old line or location of 1866. The maps of this location were transmitted by the governor to the Secretary of the Interior December 4, 1866. When, however, the legislature of the State accepted the grant—which was on February 25, 1867—the act by which they accepted it (referred to in your letter) required the line as constructed to run to Fremont and thence to Jackson. This was a legislative modification of the line, which constituted a statutory direction to its own officers and to the company, and appears to have been fully understood at the General Land Office. The road cannot be considered to have received an official definite location until after the acceptance by the legislature, which acceptance contemplated this modification. The present constructed road appears to deviate only from the original

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survey to such an extent as was necessary to cause it to conform to the requirements of the legislative act. Waiving, therefore, as before indicated, any discussion of the general question how far railroad companies which have filed locations are authorized to deviate therefrom in building their roads, I answer your inquiry by saying that the Department should in the present case accept proof of the construction of the road, although on a line different from the one originally approved, and certify the lands in question.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. CARL SCHURZ,

Secretary of the Interior.

POST-TRADERS—TRAFFIC WITH INDIANS.

A trader at a military post in the Indian country cannot lawfully maintain a traffic with the Indians unless he be properly licensed for such trade.

License to trade with the Indians at the establishments of post-traders cannot be given by the military authorities.

DEPARTMENT OF JUSTICE,

December 11, 1879.

SIR: Referring to your letter of the 9th instant, inclosing a communication from General Terry, I think there has been no such misapprehension of the facts in Borup's case as to have caused any misunderstanding of the law. In my opinion Mr. Borup, although a post-trader at Fort Custer, in the Indian country, has no right to maintain a traffic in goods with the Indians unless he be properly licensed for such trade. The question as put by General Terry in his last communication is not the real question as I understand it. Post-traders can be authorized only for the military forces, or when needed "for the accommodation of emigrants, freighters, or other citizens." I know of no authority which permits the military authorities to allow a trade at such establishments with the Indians.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. GEORGE W. MCCRARY,

Secretary of War.

Removal of Intruders from Cherokee Lands.

REMOVAL OF INTRUDERS FROM CHEROKEE LANDS.

In executing certain treaties with the Cherokee Nation providing for the removal of intruders, the Government is not bound to regard simply the Cherokee law and its construction by the counsel of the Nation, but the Department required to remove alleged intruders must determine for itself, under the general law of the land, the existence and extent of the exigency upon which such requirement is based.

DEPARTMENT OF JUSTICE,
December 12, 1879.

SIR: In reply to yours of the 21st of April last, submitting for an opinion certain questions of law upon behalf of the Cherokee Nation, with others suggested by the Commissioner of Indian Affairs in the same connection, I beg to say that, with every wish to comply with the request of the Cherokee Nation thus conveyed, I do not find that the questions concern the "administration" (Rev. Stat., sec. 356) of the Department from which they come. They are transmitted by you, as I suppose, only at the request of the Nation; and the questions added by the Commissioner seem merely incidental to those first put, intended perhaps as suggestive of a certain way of considering such former questions.

I gather that whatever there may be of present importance to the Department of the Interior in the five general interrogatories previously stated therein is to be found in the last paragraph of your note. In that you say "The whole question may be said to lie in the inquiry whether, in carrying out in good faith the provisions of the executory treaties named, the United States are bound to regard simply the Cherokee law and its construction by the counsel of the Nation, and answer the call of the officers of that nation for the removal of all persons whom they may pronounce intruders; or, on the contrary, whether, being called on to effect the forcible removal of such alleged intruders, the facts upon which the allegation rests may not with propriety, both by virtue of superior and paramount jurisdiction and in obedience to national obligation, be inquired into and determined by our own national tribunals."

To this question I reply that it is quite plain that in execut-

Improvement of Kentucky River.

ing such treaties the United States are *not* bound to regard simply the Cherokee law and its construction by the counsel of the Nation, but that any Department required to remove alleged intruders must determine for itself, under the general law of the land, the existence and extent of the exigency upon which such requisition is founded.

If I am mistaken in supposing that the questions asked by the Cherokee Nation have no administrative importance for other purposes than those covered by the above answer, I will thank you to see that, when returned, they may be stated more specifically, and with a more direct reference to the cases in which they have arisen.

Very respectfully,

CHAS. DEVENS.

Hon. CARL SCHURZ,
Secretary of the Interior.

IMPROVEMENT OF KENTUCKY RIVER.

The War Department has not authority, under the provisions of the acts of March 3, 1879, chap. 181, and June 10, 1879, chap. 15, relating to the improvement of the Kentucky River, to enter upon the locks and dams belonging to the State of Kentucky for the purpose of putting them in repair, until the State shall have ceded title to and jurisdiction over them so as to vest these in the United States, or until, after proper proceedings for condemnation had, the title shall be acquired by, and the jurisdiction shall, by act of the State, be transferred to, the United States.

DEPARTMENT OF JUSTICE,

December 15, 1879.

SIR: I am informed by a letter of your predecessor, of the 20th ultimo, that the river and harbor act of March 3, 1879, contains the following:

“For improving the Kentucky River from the mouth to Three Forks, according to estimate and report of Maj. William E. Merrill, January fourteenth, eighteen hundred and seventy-nine, one hundred thousand dollars.”

An act approved June 10, 1879, authorizes such parts of the moneys appropriated by the river and harbor act of March 3, 1879, for the improvement of Kentucky River, to be

Improvement of Kentucky River.

expended in the purchase, voluntary or by condemnation, as the case may be, of such sites as are necessary in the prosecution of the improvement.

The estimate of Major Merrill alluded to in the act is as follows:

To repair the five locks and dams on the river, \$84,102.

For twelve more locks and dams, \$989,600.

It appears that these five locks and dams were built many years ago by the State of Kentucky to create slack-water navigation on the lower ninety-five miles of the river, and that the State of Kentucky still retains the ownership thereof, and also jurisdiction over them as well as over any lands that may be required for such new locks and dams as the United States might propose to build. It further appears that the locks and dams of the State are all in a dilapidated condition, requiring extensive repairs, and that the best use to be made of the appropriation would be to repair these structures before attempting any new work.

Upon this state of facts the question arises, whether the Department possesses the right to enter upon these locks and dams for the purpose of putting them in repair, until the State of Kentucky has ceded jurisdiction over them, and the title to the sites is vested in the United States.

It is not to be supposed that Congress intended to enter upon or repair the structures belonging to the State, except after proper transfer of the rights of the State therein. It would not be possible for the Government to obtain such rights except by leave of the State, or by regular proceedings for condemnation. Such proceedings, however, would not effect a transfer of the jurisdiction. To acquire this a cession from the State would be necessary. That proceedings for condemnation may be required is contemplated by the proviso to the act: "That if the owners of such lands or sites shall refuse to sell the same at reasonable prices, then the prices to be paid shall be determined and the title and jurisdiction procured in the manner prescribed by the laws of the State in which such lands and sites are situated."

In direct answer to the inquiry, I am of opinion that the Department does not possess the right to enter upon the locks and dams for the purpose of putting them in repair,

Soldiers and Sailors' Orphans' Home.

until the State shall have ceded title and jurisdiction over them so as to vest these in the United States, or until, after proper proceedings for condemnation had, the title shall be acquired by, and the jurisdiction shall by act of the State be transferred to, the United States.

Very respectfully, your obedient servant,
CHAS. DEVENS.

Hon. ALEXANDER RAMSEY,
Secretary of War.

SOLDIERS AND SAILORS' ORPHANS' HOME.

By act of June 22, 1874, chap. 388, an appropriation was made to reimburse the Soldiers and Sailors' Orphans' Home for certain moneys (the balance of a deposit of moneys theretofore appropriated for the Home by Congress) involved in the bankruptcy of Jay Cooke & Co. An offer having been made to the Secretary of the Treasury to purchase the claim against that firm for the amount due on account of said deposit: *Held* that this claim must now be treated as a claim belonging to the United States, and that the Secretary has no power to sell the same or to do more than receive for the United States whatever may be paid by the debtor, or his assignee, in discharge of the debt.

DEPARTMENT OF JUSTICE,
December 15, 1879.

SIR: Your letter of the 4th instant informs me of an offer made to purchase a demand against the estate of Jay Cooke & Co., being for balance of certain moneys deposited in the bank of the firm by H. D. Cooke, one of the members, to the credit of the Soldiers and Sailors' Orphans' Home.

By a decision in the matter of the Reform School, which involved a similar question, it was held that the money, having been paid over to the local corporation, was not in law the money of the United States, and that it did not have, therefore, priority to ordinary debts.

In my view, the information you have given the parties offering to buy the demand, viz, that the amount of this balance is equitably due to the United States, the same sum having been reappropriated by Congress and paid to supply the moneys supposed to have been lost, and also that the Treasury Department has no power to sell the claim or do

Soldiers' Home—Three Months' Extra Pay.

more than receive for the United States whatever may be paid by the original debtor, or his assignee, in discharge of the debt, is correct.

On examining the statutes, it seems to me quite clear that an appropriation was made for the purpose of reimbursing the Soldiers and Sailors' Orphans' Home for the moneys lost by the failure of Jay Cooke & Co., and that the United States treated the claim against that firm as one which was thereafter its own. This reappropriation was accepted upon these terms by the Home when it received the money.

It is not important whether it is or is not necessary to use the name of the Home to enforce the claim, should it be necessary to take adversary proceedings, as the Home could not object to this should it become necessary. The present legislation seems to me ample to enable the Secretary of the Treasury to demand and receive the amount of dividend from the bankrupt estate. In case there should be a refusal by that estate, it would also seem that the Attorney-General had under the act ample power to enforce the claim, and to collect, in the name of the United States or that of the Home, the amount which was due as a dividend on account of the deposit, and pay the same into the Treasury.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. JOHN SHERMAN,
Secretary of the Treasury.

SOLDIERS' HOME—THREE MONTHS' EXTRA PAY.

The three months' extra pay provided by section 5 of the act of July 19, 1848, chap. 104, is a gratuity, the right to which, on the death of the officer or soldier without receiving the same, does not survive as part of his estate. The widow, children, parents, or brothers and sisters of the deceased officer or soldier do not become entitled thereto *jure representationis*, or in the quality of legal successors to his estate, but solely by force of their designation in the statute.

Held, accordingly, that the Soldiers' Home, in the District of Columbia, has no right under section 4818 Rev. Stat. to receive, as "moneys belonging to the estates of deceased soldiers," the amounts to which their widows, children, &c., are entitled by virtue of the provisions of the fifth section of said act of 1848, and which "are or may be un-

Soldiers' Home—Three Months' Extra Pay.

claimed for the period of three years subsequent to the death of such soldiers."

Upon the same grounds and considerations on which the foregoing ruling proceeds: *Held*, also, that the Soldiers' Home derives no right under section 4818 Rev. Stat. to receive the extra pay provided by the act of February 19, 1879, chap. 90, where the same remains unclaimed as aforesaid by the widows, children, &c., of deceased soldiers who were entitled thereto.

DEPARTMENT OF JUSTICE,

December 16, 1879.

SIR: By a letter of your predecessor, of the 26th of September last, the following questions were submitted for my opinion:

"First. Are the sums to which widows, children, &c., become entitled by virtue of the provisions of the fifth section of the act approved July 19, 1848 (9 Stat., 247), 'moneys belonging to the estates of deceased soldiers,' within the meaning of section 4818 Revised Statutes, and is the Soldiers' Home in the District of Columbia entitled to receive under the same section of the Revised Statutes such of said sums as are or may be unclaimed for the period of three years subsequent to the death of such soldiers?"

"Second. Does the act approved February 19, 1879 (vol. 20 U. S. Stat., p. 316), appropriating money for the payment of the three months' extra pay provided for by the act of July 19, 1848, to the officers and soldiers indicated therein, authorize payment to the representatives of such officers and soldiers, deceased, as are mentioned in said act of July 19, 1848, or to the Soldiers' Home in the District of Columbia, under the provisions of section 4818 Revised Statutes?"

The statutory provisions upon which these questions arise are the following:

By section 5 of the act of July 19, 1848, it was provided: "That the officers, non-commissioned officers, musicians, and privates engaged in the military service of the United States in the war with Mexico, and who served out the term of their engagement, or have been or may be honorably discharged—and first to the widows, second to the children, third to the parents, and fourth to the brothers and sisters of such who have been killed in battle, or who died in service, or who,

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having been honorably discharged, have since died, or may hereafter die, without receiving the three months' pay herein provided for—shall be entitled to receive three months' extra pay: *Provided*, That this provision of this fifth section shall only apply to those who have been in actual service during the war."

This provision was repealed by the fourth section of the act of July 12, 1870 (16 Stat., 250).

Subsequently, by the act of February 19, 1879, it was provided: "That the Secretary of the Treasury be, and he is hereby, directed, out of any moneys in the Treasury not otherwise appropriated, to pay to the officers and soldiers engaged in the military service of the United States in the war with Mexico, and who served out the time of their engagement or were honorably discharged, the three months' extra pay provided for by the act of July nineteenth, eighteen hundred and forty-eight, and the limitations contained in said act, in all cases, upon the presentation of satisfactory evidence that said extra compensation has not been previously received: *Provided*, That the provisions of this act shall include also the officers, petty officers, seamen, and marines of the United States Navy, the Revenue Marine Service, and the officers and soldiers of the United States Army employed in the prosecution of said war."

Section 4818, Revised Statutes, reads as follows: "For the support of the Soldiers' Home the following funds are set apart, and are hereby appropriated: All stoppages or fines adjudged against soldiers by sentence of courts-martial, over and above any amount that may be due for the reimbursement of Government, or of individuals; all forfeitures on account of desertion, and all moneys belonging to the estates of deceased soldiers, which are or may be unclaimed for the period of three years subsequent to the death of such soldiers, to be repaid by the commissioner of the institution, upon the demand of the heirs or legal representatives of the deceased."

In regard to the first inquiry proposed: the three months extra pay provided by the act of 1848 is simply a gratuity in respect of past service. It forms no part of the consideration which entered into the engagement under which that service was performed, and it stands on a different footing from

Soldiers' Home—Three Months' Extra Pay.

compensation which formed part of the consideration of such engagement. The right to this latter rests upon an obligation of the Government springing out of the engagement, and, on the death of the officer or soldier who may have been entitled to the compensation but who had not received it, that right constitutes part of the estate of the deceased, and goes to those upon whom *ex jure representationis* his estate is devolved. With the extra pay mentioned it is otherwise. Being a gratuity, which, until actual receipt by the beneficiary, is in its nature alterable or revocable at the pleasure of Congress without thereby affecting any vested right, and of which the disposition or payment is moreover governed entirely by the statute bestowing it, those only are to be deemed entitled to receive it to whom *by the terms of the statute* (i. e., of the act of 1848) it is authorized to be paid.

We must presume that Congress has designated in the statute referred to all upon whom it was designed to confer the benefits thereof. The beneficiaries designated are the officer or soldier in respect of whose service the extra pay is provided, and in case of his death without receiving this allowance, then his widow, children, parents, or brothers and sisters, in the order named. Here the widow, children, parents, &c., do not become entitled *jure representationis*, or in the quality of *legal successors to the estate* of the deceased officer or soldier, but by force of the designation in the statute. On the death of the officer or soldier before the receipt of the gratuity, his right thereto does not survive as part of his estate, and as such devolve upon the widow, children, &c. In the absence of any provision in the statute comprehending the *legal representatives* of the beneficiaries designated, it must be deemed that the right of each beneficiary to the allowance was meant to terminate on the death of such beneficiary, and not thereafter to become part of the estate of the deceased.

To the first inquiry I accordingly reply that the sums referred to therein are not "moneys belonging to the estates of deceased soldiers," and that the Soldiers' Home in the District of Columbia is not entitled, under section 4818 of the Revised Statutes, to such sums as "are or may be unclaimed

Contingent Fund of War Department.

for the period of three years subsequent to the death of such soldiers."

The second inquiry relates to the act of February 19, 1879. This act must obviously receive an interpretation similar to that given to the provisions of the act of 1848, which were involved in the first inquiry; and the same grounds and considerations upon which the reply to that inquiry proceeds appear to me to apply to the second inquiry. In answer to the latter I have, therefore, the honor to state that in my opinion the Soldiers' Home derives no right, under section 4818 Revised Statutes, to receive the extra pay referred to.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. ALEXANDER RAMSEY,
Secretary of War.

CONTINGENT FUND OF WAR DEPARTMENT.

The contingent fund of the War Department cannot be applied to meet the expense attending the employment of a detective to discover, and furnish evidence necessary to convict, the parties concerned in setting fire to certain buildings which were rented for the Quartermaster's Department at Atlanta, Ga.

The words "contingent expenses," as used in the appropriation acts, mean such incidental, casual expenses as are necessary or appropriate and convenient, in order to the performance of duties required by law of the Department or the office for which the appropriation is made.

DEPARTMENT OF JUSTICE,
December 19, 1879.

SIR: Your letter of the 12th instant, referring to a recommendation of the United States district attorney for the district of Georgia that a detective be employed, with compensation in the sum of \$1,000, to discover and furnish the evidence necessary to convict the parties concerned in setting fire to the quartermaster's stables and shops at Atlanta, Ga., in the year 1877, calls my attention to a copy (which you inclose) of the Quartermaster-General's report on the subject, dated the 4th instant, and asks my "opinion as to whether any funds can be employed to employ a detective in the case."

Contingent Fund of War Department.

It appears from the statement of the Quartermaster-General, and from the letter of Mr. Farrow, the United States attorney (which I had the honor to transmit to you on the 17th ultimo), that the stables and shops fired, as is alleged, by incendiaries, were upon ground rented to the United States, jurisdiction over which has never been ceded by the State of Georgia. The crime, therefore, was committed (if committed at all) against the State of Georgia, the United States having no jurisdiction over the premises.

There is an appropriation for the Department of Justice, which is disbursed by the Attorney-General, for the detection and prosecution of crimes *against the United States*. It is plain that this fund cannot be drawn upon for the detection and punishment of crimes against any State.

There is no other fund controlled by the Attorney-General which can be used for this purpose.

The Quartermaster-General mentions the contingent fund of the War Department as possibly available for the purpose.

There are appropriations for the "contingent expenses" of the Office of the Secretary of War, and of the several bureaus of the War Department.

These words "contingent expenses," as used in the appropriation acts, mean such incidental, casual expenses as are necessary, or at least appropriate and convenient, in order to the performance of the duties *required by law* of the Department or the office for which the appropriation is made. I find no law which makes it the duty of the military power to pursue and bring to trial parties charged with offenses against a State. I think, therefore, that the contingent fund of the War Department cannot be drawn upon to meet the expenses of a detective in the case presented, and I am not aware that there is any fund provided by Congress which can be used for the purpose.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. ALEXANDER RAMSEY,
Secretary of War.

Commission of Pay-Inspector in the Navy.

PUBLIC BUILDING AT OMAHA.

Where land, at the city of Omaha, Nebr., was *donated* to the United States for the purpose of a site for a certain public building, for the construction of which an appropriation was made by the act of June 23, 1879, chap. 35: *Held* that the consent of the legislature of the State to the grant is required by force of section 355 Rev. Stat. before any part of the appropriation can be lawfully expended in the erection of the building. (See Joint Resolution No. 9, of February 5, 1880.)

DEPARTMENT OF JUSTICE,

January 7, 1880.

SIR: Your letter of the 5th instant submits to me the question whether section 355 Revised Statutes applies to the case of a proposed storehouse and depot building at Omaha, Nebr., the ground for the erection of which has been given to the United States, and whether the consent of the legislature of Nebraska must be obtained as a condition precedent to the expenditure of the appropriation made by the act of June 23, 1879, in the erection of the proposed buildings, or any part of the same. You also inclose an opinion of the Judge-Advocate-General upon the question, and request me to advise you whether I concur therein.

I have carefully read the opinion of the Judge-Advocate-General. In my view it is correct, and I concur fully therein.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. ALEXANDER RAMSEY,

Secretary of War.

COMMISSION OF PAY-INSPECTOR IN THE NAVY.

Section 1475 Rev. Stat. does not give to a pay-inspector in the Navy the *grade* of commander. It confers upon him the *rank* of commander *by relation* (only) to the rank of a line officer of that grade.

By the use of the terms "relative rank," in that section, Congress intended to make the grades of the pay corps of the Navy equal to, but not identical with, the grades of the line with which they are by those terms associated.

As generally used in reference to the naval and military service, the word "title" signifies the name by which an office, or the holder of an office, is designated and distinguished, and by which the officer has a right

Commission of Pay-Inspector in the Navy.

to be addressed; "grade," one of the divisions or degrees in the particular branch of the service, according to which officers therein are arranged; and "rank," the position of officers of different grades, or of the same grade, in point of authority, precedence, or the like, of one over another. Sometimes "rank" is used as synonymous with "grade," and the title of an officer (*e. g.*, admiral, vice-admiral) may denote both his grade and his rank.

The designation "pay-inspector" expresses both title and grade in the pay corps.

Held, accordingly, that a commission in the following form: "John Doe, a pay-inspector from the — day of —, A. D. 187—, with the relative rank of commander," gives the appropriate title and grade of the officer named therein, and fully satisfies the requirement of section 1480 Rev. Stat. in that regard.

DEPARTMENT OF JUSTICE,

January 8, 1880.

SIR: A memorandum signed by Messrs. Bartley & Southard, stating that the Secretary of the Navy is now issuing commissions in the following form: "John Doe, a pay-inspector from the — day of —, A. D. 187—, with the relative rank of commander," and claiming that the form required by law should be as follows: "John Doe, a pay-inspector from the — day of —, A. D. 187—, of the grade of commander, with the relative rank as provided by law," has been referred by yourself to me for my opinion upon the question thus raised.

I have carefully read the brief of Messrs. Bartley & Southard, and have heard orally Mr. Southard and several other gentlemen of the staff who are interested in this question, and respectfully reply that in my opinion the commission as stated to be issued by the Secretary of the Navy is correct in form.

The subject is an interesting one, as the order and precedence of the various officers of the Navy, and the proper relation which the various corps of the Navy bear to each other, are felt to be of importance by all officers.

The sections immediately to be considered are 1474 to 1480, inclusive, Revised Statutes. Section 1475 is as follows:

"Officers of the pay corps on the active list of the Navy shall have relative rank as follows:

"Pay directors, the relative rank of captain.

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"Pay inspectors, the relative rank of commander.

"Paymasters, the relative rank of lieutenant-commander or lieutenant.

"Passed assistant paymasters, the relative rank of lieutenant or master.

"Assistant paymasters, the relative rank of master or ensign."

The section 1480 provides, among other things, as follows: "The grades established in the six preceding sections for the staff corps of the Navy shall be filled by appointment from the highest numbers in each corps, according to seniority; and new commissions shall be issued to the officers so appointed, in which the titles and grades established in said sections shall be inserted," &c.

It is claimed that the section 1475—this is the point to be considered—gives to the officer in question the grade of commander in the Navy. It would not perhaps be safe to say that each of the words "title," "grade," and "rank" is invariably used in the same sense in all the statutes of the United States. As generally used I think they may be fairly defined as follows: Title is the name by which an office, or the holder of an office, is designated and distinguished in the statute, and by which the officer has a right to be known and addressed; grade expresses one of the divisions or degrees in the particular department or branch of the service according to which offices therein are classified or graded; and rank, which originally signified that which determines the right to command, and is still an inseparable incident to such right, expresses the position of officers of different grades, or of the same grade, in point of authority, precedence, or the like, of one over another. The word "rank" is sometimes used, however, as synonymous with "grade." Thus, when it is said that a particular officer shall have the rank of captain, commander, &c. (there being no qualifying word), it is used in the sense of grade, and this whether the rank is permanently or temporarily given.

In some cases the same word or appellation may express alike title, grade, and rank with clearness. Thus, in section 1362, which provides that "The active list of the line officers

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of the Navy of the United States shall be divided into eleven grades, as follows, namely:

“First. Admiral.

“Second. Vice-admiral.

“Third. Rear-admirals,” &c.—

each of the words “admiral” and “vice-admiral” expresses the title of the officer holding either of those respective positions, his grade and his rank; in other words, the name by which he is entitled to be addressed, the division or degree in the line of the Navy to which he belongs, and the rank which he holds in it. If, however, there were more than one officer of the same title and grade, it would not necessarily express rank. Thus, “rear-admirals,” which is a grade composed of more officers than one, each having a right to the same title, does not express the rank which they hold *inter sese*, although it expresses the rank so far as those above and below that grade are concerned.*

As title may clearly denote grade, the inquiry here arises whether the word “pay-inspector” is an expression which conveys the idea alike of title and grade. If so, this designation is all that the officer has a right to require in his commission. That title is not necessarily expressive of grade appears from examining the sections 1390 and 1476. By these the title of “chief engineer” is given to officers who are divided into three distinct grades by the rank to which they are entitled by relation to the line of the Navy. But there is no such subdivision into grades of the titles given to officers holding the position of pay-director or of pay-inspector in the pay corps. Here the titles of the officers at the same time designate their respective grades in that corps; and it is provided that these officers shall have the relative rank of certain grades in the line of the Navy.

It is obvious that every military establishment, whether Army or Navy, must have connected with it certain organizations of business or scientific men whose services, although auxiliary to the combatant force of such establishment, are

* NOTE.—For a discussion of the distinction between rank, grade, and office, see opinion of the court (delivered by Richardson, J.) in the recent case of *Wood vs. United States*, 15 Ct. Cl. R., 151, where the subject is learnedly and ably treated.

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yet necessary to its efficiency. These constitute the staff corps as distinguished from the line. It is also necessary that the officers of such a corps, being gentlemen who render important and valuable services, should be brought into such relations with the officers of the line that their own dignity shall be preserved, and the proper order of a military establishment maintained. While, therefore, rank is primarily established with reference to those who are entitled to command, with a view to determine the order in which they are to command, it is necessary to give to the grades created in other corps a rank which shall either be the same with the rank of the officers of the line, or which, by relation to the rank of the officers of the line, shall entitle those holding it to such honor, attention, and respect as is accorded to officers of the line of the rank to which it relates or is assimilated. Such rank, whether it be absolute in its terms, or whether it be termed assimilated or relative rank, may, of course, be always subject to such exceptions as the legislative power may deem proper and convenient.

Orders were early passed by various Secretaries of the Navy providing that certain officers of the staff should rank with certain officers of the line, the same orders providing that this should not give them authority to exercise military command, and should give no additional right to quarters. Two general orders of this nature, of Secretary Bancroft and Secretary Mason, relating to surgeons and pursers, were confirmed by the act of August 5, 1854. A similar order by Mr. Toucey in relation to engineers was also confirmed by a subsequent statute. These orders did not give to the staff officers to whom they referred the same rank as that held by officers of the line, but a rank equal to and assimilated with that of officers of the line. In January, 1871, a bill was passed by the House of Representatives which gave to each staff officer definite or absolute rank, the phrase used in regard to the officer in question being "thirteen pay-inspectors, who shall have the rank of commander." This bill was the subject of much discussion, and in the Senate it was amended, and finally passed both houses of Congress in a form which gave to the officers of the staff relative rank, the phrase used in regard to the officer whose case we are considering being

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“thirteen pay-inspectors, who shall have the relative rank of commander.” This statute is embodied in the sections of the Revised Statutes which we are considering. It is impossible to conceive why this change was made if Congress, when it finally passed the bill, did not suppose that the “relative” rank of commander was something different from the rank or grade of commander. The terms seem almost to force the conclusion that the pay-inspector was to have the rank of commander by reference or relation to the rank held by a commander in the line. While undoubtedly Congress might provide that he should have the absolute rank of commander, and might annex to it appropriate conditions considering the duties expected to be performed by him—such as that he should not exercise military command—it is apparent that, in inserting the word “relative,” Congress has made the provision which it deemed necessary for the respect which was undoubtedly to be accorded to him. In the Army it is no doubt true that certain officers whose duties are strictly those of staff officers—like the officers of the pay corps of the Army—have absolute rank (see section 1182 Rev. Stat.), but it will be observed that neither the word “relative,” nor any word expressive of the same idea, is found in the section. These officers of the Army are identified with certain grades of the line by appropriate words conferring absolutely the rank of those grades, but by the use of the term “relative” Congress indicates its intention to make the grades of the pay corps of the Navy equal to, but not identical with, the grades of the line with which they are connected by relation.

I am therefore of opinion that a commission in the form proposed by the Secretary gives the officer by the word “pay-inspector” the title and grade to which he has a right, and that the addition of the relative rank, while not positively required by the statute, is eminently appropriate. Especially is this the case in view of the fact that with reference to certain officers of the staff corps this would be necessary, as their grade would be determined by the addition of their relative rank. (Sections 1390 and 1476 Rev. Stat.)

Very respectfully, your obedient servant,

CHAS. DEVENS.

The PRESIDENT.

Improvement of South Pass of the Mississippi.

IMPROVEMENT OF SOUTH PASS OF THE MISSISSIPPI.

Capt. James B. Eads is not entitled to interest on the one million dollars retained by the United States (under the provisions of the act of March 3, 1875, chap. 134) as security for the maintenance of the completed channel of the required width and depth through the South Pass of the Mississippi, for any period of time occurring after the completion of the channel during which he has failed to maintain the channel. Every such period of failure must be excluded in computing the annual interest payable on said million dollars, just as the same is to be excluded from the quarterly or annual payments provided for.

DEPARTMENT OF JUSTICE,
January 20, 1880.

SIR: Your letter of the 13th instant submits to me an inquiry as to the proper construction of the act of Congress approved March 3, 1875 (18 Stat., 464), and amendatory acts, in reference to the time for which Capt. James B. Eads is entitled to interest on one million of dollars, which amount remains "as security in the possession of the United States;" the demand for payment of the first installment of interest having been made, and the inquiry being whether interest is allowable to Captain Eads for all the time from July 8, 1879, continuously, according to the time of the calendar year, or, if not for that time, then for what time should it be paid?

Your letter does not state in terms that for a portion of the time subsequent to July 8, 1879, the channel constructed by Captain Eads was not in fact maintained; but I understand such to be the case, and your inquiry, therefore, to present the question whether Captain Eads is entitled to interest for such periods of time, if any, as shall occur after the original completion of the channel during which it shall not be maintained by him.

It is a part of the contract of Captain Eads with the United States that the channel constructed shall, when completed, be maintained for the period of twenty years. To assure the performance of this part of his undertaking is the purpose of the above-mentioned security held by the United States. For this service he is entitled to receive annual compensation at the rate of \$100,000. But it is provided, "if any failure to maintain said channel of thirty feet in depth and three

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hundred and fifty feet in width shall occur, the date for releasing the said money held in pledge shall be postponed for an equal period of time, and the compensation for maintaining said channel shall cease until said depth and width shall be again restored, the maintenance of a channel of thirty feet in depth and three hundred and fifty feet in width for twenty years, exclusive of all such periods of failure, being intended by this act."

The depths and widths required by the original act differ from those required by the amendatory acts; but this point is not important here.

In a former opinion it was held by me that annual compensation could not be paid for periods during which the channel was not maintained, and that the times of those payments (which were termed quarterly) were necessarily postponed when such periods of failure occurred, so as to exclude such periods from the quarterly and annual payments provided for. With this opinion I remain satisfied, and now assume it to be correct. The reasons for the conclusion I then reached, and the quotations from the acts to support the same, I do not think it necessary to here restate.

The question now presented is whether (even assuming the opinion referred to to be correct) interest is still to be paid upon the sum detained by the United States during such periods of failure, or whether these payments, like the payments of annual compensation, are to be postponed so as to exclude such periods.

The provision for the payment of interest is to be found in the following clause of the original act:

"When a channel thirty feet in depth and three hundred and fifty feet in width shall have been obtained by the effect of said jetties and auxiliary works aforesaid, the remaining one million dollars shall be deemed as having been earned by said Eads and associates; but said amount shall remain as security in the possession of the United States for the purposes hereinafter set forth, interest at five per centum per annum on the same being payable to said Eads, his assigns and legal representatives, semi-annually, from the date when a channel of thirty feet in depth and three hundred and fifty

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feet in width shall have been first secured, so long as said money or any part thereof is held by the United States."

The provisions for the payment of interest on the money held in pledge, and of the annual compensation, are found connected together in most of the sections of this statute. It seems not to be an unwarranted inference that Congress looked alike to the money received by Eads as interest, and to what is termed "annual compensation," for the maintenance of the channel. The clause which provides for an expenditure from the sum of money held in pledge is as follows: "That in case said Eads and associates, in order to maintain a channel of thirty feet in depth and three hundred and fifty feet in width, shall deem it necessary to expend on said works, during any one or more of said twenty years, any money in excess of the annual payments received by them during said year or years under this act, the Secretary of War shall, on satisfactory proof of such expenditures, authorize, as often as such extra expenditures may require, the payment of the same from the said money in pledge to said Eads or his legal representatives."

Strictly speaking, there are no annual payments. The compensation as distinguished from interest is paid quarterly, and the interest is paid semi-annually. The words "annual payments" as used in this clause may fairly be interpreted to mean the sums payable to Mr. Eads during a year.

The sum held in pledge is distinctly retained as security for the maintenance of the channel. How Mr. Eads could be fairly entitled to interest upon the same during the periods when the channel is not maintained it is not easy to perceive. It is contended, however, that this is the precise language of the statute, and that any other construction violates the language. But any construction which would give to Mr. Eads interest during the periods of failure would violate the whole spirit of the act, and would lead to a result, if the act itself as a whole is considered, so clearly at variance with it as to be inadmissible. According to this theory, Mr. Eads, even if he failed to maintain the channel permanently, would still be entitled to these semi-annual payments, and a security given for the maintenance of the channel would result only in this: that the party would not at the end of the twenty

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years receive the principal sum, but would be entitled to a claim against the United States for the interest on that principal sum for an indefinite number of years. The meaning of the legislature is to be ascertained not only by the precise words used in a phrase of the statute, but by the reason and motive upon which it proceeded, by the end in view, and by the purpose which was designed. (*The United States v. Freeman*, 3 How., 556; *Becke v. Smith*, 2 Mee. & W., 195; *Attorney-General v. Lockwood*, 9 Mee. & W., 398.)

Mr. Chief Justice Taney, in speaking of the rules of interpretation, says, in *Brewer v. Blougher* (14 Pet., 198): "It is undoubtedly the duty of the court to ascertain the meaning of the legislature from the words used in the statute and the subject-matter to which it relates; and to restrain its operation within narrower limits than its words import, if the court are satisfied that the literal meaning of its language would extend to cases which the legislature never designed to embrace in it." Mr. Justice Davis remarks, in *Heydenfeldt v. Daney Gold and Silver Mining Company* (93 U. S. Rep., 634): "If a literal interpretation of any part of it would operate unjustly, or lead to absurd results, or be contrary to the evident meaning of the act taken as a whole, it should be rejected. There is no better way of discovering its true meaning, when expressions in it are rendered ambiguous by their connection with other clauses, than by considering the necessity for it and the cause which induced its enactment."

Applying these well-known rules of construction, it would therefore seem that a conclusion which would defeat the object of the legislature in providing itself with security for the maintenance of the work, and give to the party failing the benefit of the security in what is ordinarily the most satisfactory form—that of a permanent claim for interest upon the United States—is not one to be readily adopted. The rate of interest provided to be paid was the full rate which the United States was paying upon its public securities; and it cannot be deemed that the United States was secured when it was compelled to pay this interest for the periods during which Mr. Eads failed to perform his contract. If Mr. Eads should abandon the maintenance of this channel, it certainly would not be unjust, nor would it be at variance with the fair

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intent of this act, to hold that the United States might, by proper legislation, devote the sum thus held in pledge to the maintenance of the channel, by an expenditure of it through its own officers or by any new contractor that might be selected.

In direct answer to your inquiry, I am therefore of opinion that Mr. Eads is not entitled to payment of interest for all the time from July 8, 1879, continuously, according to the time of the calendar year, if during that time there have been periods when he has failed to maintain the channel; but that such periods of failure must be deducted, as such deduction is made in the matter of what is termed the "annual compensation."

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. ALEXANDER RAMSEY,

Secretary of War.

BRIDGE ACROSS THE PORTAGE CANAL.

It is not obligatory upon the United States, as proprietor of the line of water communication between the Fox and Wisconsin Rivers formerly owned by the Green Bay and Mississippi Canal Company, to maintain the draw-bridge over the Portage Canal, located at Wisconsin street, in the city of Portage, Wis., where that street crosses the canal and intersects De Witt street.

DEPARTMENT OF JUSTICE,

January 21, 1880.

SIR: The accompanying papers were submitted to me by your predecessor by letter dated the 30th of July last, with a request for an opinion on the question of the liability of the United States to maintain a certain draw-bridge across the Portage Canal in the city of Portage, Wis. I have now the honor to return them, and to state my views on the question proposed.

In that letter my attention was directed to opinions of R. L. D. Potter and O. P. Thomas, esqs., special assistants to the Attorney-General, dated January 2, 1878, August 10, 1878, and July 19, 1879, given at the request of the engineer

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officer in charge of the Fox and Wisconsin River improvement, and to opinions of Messrs. Cox & Rogers and L. S. Dixon, esq., dated June 19, 1878, and November 22, 1878, given in behalf of the city of Portage, all of which are with the papers mentioned, and in which the same question is fully discussed.

Messrs. Potter and Thomas, in their opinions, deny the liability of the United States to maintain the bridge, while the other gentlemen named, in their opinions, hold the contrary. After careful examination of the subject, I concur in the conclusion reached by the former.

The facts upon which the inquiry arises appear to be as follows:

By act of Congress of August 8, 1846 (9 Stat., 83), a grant of land was made to the State of Wisconsin for the purpose of improving the navigation of the Fox and Wisconsin Rivers, and of constructing a canal to unite these rivers at or near the portage; and the same act also provided that "the said rivers, when improved, and the said canal, when finished, shall be and forever remain a public highway for the use of the Government of the United States," &c.

This grant was accepted by the State by an act of its legislature dated June 29, 1848. By a subsequent act of the State legislature, dated August 8, 1848, it was provided that the works of improving the said rivers and connecting them by a canal should be carried on directly by the State, and the construction of the improvements and the superintendence and repair of them after completion were placed under the direction and control of a board of public works.

By an act of the State legislature, dated July 6, 1853, the Fox and Wisconsin Improvement Company was incorporated. This act granted and surrendered to that company the works of improvement contemplated by the said act of August 8, 1848, and the acts supplemental to and amendatory thereof, "together with all and singular the right of way, dams, locks, canals, water power, and other appurtenances of said works; also, all the right possessed by the State of demanding and receiving tolls and rents for the same, so far as the State possesses or is authorized to grant the same, and all privileges of constructing the said works and repairing the same,

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and all other rights and privileges belonging to the improvement, to the same extent and in the same manner that the State now holds or may exercise such rights by virtue of the acts above referred to," &c. The same act also granted to the company, upon certain terms and conditions, the lands granted by Congress in aid of said improvement and remaining unsold.

In pursuance of an act of the State legislature of October 3, 1856, a deed of trust was executed by the Fox and Wisconsin Improvement Company conveying to the trustees named in the deed "all the unsold lands granted to the State of Wisconsin by the several acts and the resolutions of Congress, and all the works of improvement constructed, or to be constructed, on said rivers, and all and singular the rights of way, dams, locks, canals, water-power, and other appurtenances of said works, and all rights, privileges, and franchises belonging to said improvement, and all property of said company, of whatever name and description, for the uses, trusts, and purposes" therein specified.

By a subsequent act of the State legislature, dated April 13, 1861, it was provided that, in case of a sale by the trustees, the purchasers at such sale should "take, hold, and enjoy all the rights and title to the lands and property purchased by them, heretofore held by this State or granted to the said Fox and Wisconsin Improvement Company, or conveyed by the said company to the said trustees, with full power to sell, convey, or otherwise dispose of the same," &c.; and the purchasers were by the same act authorized to form a corporation under the laws of the State.

A sale by the trustees took place in 1866, and the purchasers, under the authority given by the said act of 1861, formed a new corporation, called the Green Bay and Mississippi Canal Company. This company was clothed with "all the rights, powers, privileges, franchises, and capacities acquired by the said purchasers, or at any time possessed by or vested in the said Fox and Wisconsin Improvement Company by virtue of any law of this State or of the United States, subject to all the existing contracts of said Fox and Wisconsin Improvement Company so far as they apply to the control of any specific portion of said works of improvement and the

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ownership and control of any portion of the water-power on the line of said improvement," and was to "hold the said lands and property so purchased, with all the rights, privileges, immunities, and exemptions which appertain to said lands and property as held by the said Fox and Wisconsin Improvement Company," &c.

The act of Congress of July 7, 1870 (16 Stat., 189), authorized the Secretary of War to ascertain the sum which ought in justice to be paid to the Green Bay and Mississippi Canal Company as "an equivalent for the transfer of all and singular its property and rights of property in and to the line of water communication between the Wisconsin River aforesaid and the mouth of the Fox River, including its locks, dams, canals, and franchises, or so much of the same as shall, in the judgment of said Secretary, be needed"; and to that end he was authorized to join with the company in appointing a board of arbitrators. Arbitrators were subsequently appointed who made their award.

The award having been approved by the Secretary of War, he reported to Congress on the 8th of March, 1872, that \$325,000 ought in his judgment to be paid to the said company as an equivalent for the transfer to the United States of all the property, rights, and franchises embraced in said award, provided Congress should determine to purchase the whole thereof; but he was of opinion that the personal property appraised by the arbitrators at \$40,000 (consisting of dredge-boats, dump-scows, &c.) and the franchises appraised by the same at \$140,000 (consisting of water-powers and lots necessary to the enjoyment of the same) were not needed; and, deducting the two latter valuations, the value of the remaining property, franchises, &c., amounted to \$145,000. The Secretary accordingly reported that the last sum was in his opinion a just equivalent for the transfer of so much of said property, franchises, &c., as was needed by the United States.

By an act of June 10, 1872, chap. 416, Congress appropriated \$145,000 "for payment to the Green Bay and Mississippi Canal Company for so much of all and singular its property and rights of property in and to the line of water communication between the Wisconsin River and the mouth of the

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Fox River, including its locks, dams, canals, and franchises, as were under the act of July 7, 1870, reported by the Secretary of War to be needed."

Afterwards, by a deed dated September 18, 1872, the Green Bay and Mississippi Canal Company, in consideration of \$145,000, conveyed to the United States all its property and rights of property in and to the said line of water communication, excepting the personal property and franchises which the Secretary of War had previously reported to Congress as not needed.

The bridge in question is a draw-bridge over the Portage Canal, located at Wisconsin street, in the city of Portage, where said street crosses the canal and intersects De Witt street. It appears that this bridge was erected by the Fox and Wisconsin Improvement Company in pursuance of an agreement between that company and the city of Portage, whereby the company bound itself that it would "*within one year from the 1st of May, 1859, erect and for all time to come maintain and operate at its own expense a good, convenient, and suitable draw-bridge across the canal in the city of Portage, from Wisconsin street, on the southerly side of said canal, to a point on the northerly side of said canal equidistant between Wisconsin and De Witt streets, in such form as to furnish a convenient crossing for teams and foot-people at all times from each of said streets, and so as equally to accommodate both streets, except when the draw is open for boats and any other craft to pass, or for ordinary repairs.*" The agreement contained a release by the city of all obligation or liability on the part of the improvement company to erect or maintain any other bridges across the canal within the city; and it was expressly declared to be binding upon "both parties, their successors and assigns."

The obligation to maintain this bridge, it is alleged, was recognized and kept by the Fox and Wisconsin Improvement Company; next by its successor, the Green Bay and Mississippi Canal Company; and lastly by the United States, the assignee of the latter company, until recently.

Recurring to the acts of the State legislature hereinbefore cited, no provision is found therein which devolved upon either the Fox and Wisconsin Improvement Company or upon

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the Green Bay and Mississippi Canal Company the duty of erecting and maintaining bridges across the canal where it intersects highways or streets; nor does it appear that such duty was devolved upon them by force of any general law of the State applicable to such cases of intersection. It is true that, whilst the work of improving the Fox and Wisconsin Rivers and connecting the same by a canal was carried on directly by the State, the latter, by special legislation, provided for the construction of certain bridges across the canal at the expense of the improvement fund; and the inference sought to be drawn from this is, that it was a part of the plan and mode of improvement adopted by the State that the bridges across the canal should be built, maintained, and operated by the State at the expense of the improvement fund. But, conceding that to have been the plan and mode adopted for the execution of the work by the State, it is not perceived that the transferee of the State became thereby, and without any legislative or contract provision imposing it, charged with the burden of erecting and maintaining those bridges. Unless such burden were imposed by the terms of the grant from the State, or, as regards the future cutting of the canal across streets and highways, by a State law requiring suitable bridges in this case to be built and maintained, the grantee would clearly not be bound to assume it; nor would the successors or assigns of the grantee be bound.

As to the agreement with the city of Portage above mentioned, this does not present the case of a contract or covenant annexed to and running with the improvement, to which the original owners thereof have subjected it, and which by mere operation of law becomes obligatory upon their successors or assigns. It is wholly collateral to the work. A contract of this character could only bind those who entered into it. The successors or assigns who might thereafter become owners of the work or franchise would not be bound thereby without an agreement on their part to that effect. The agreement with the city of Portage, therefore, cannot constitute the foundation of an obligation on the part of the United States to maintain the bridge, in the absence of an assumption of this agreement by the United States. In the absence of such assumption, the obligation of the United

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States to maintain the bridge, if that obligation exists at all, must rest upon some statutory provision of the State annexing it to the franchise formerly held by the Green Bay and Mississippi Canal Company, by force of which it devolved upon the United States on the purchase of the improvement from that company. The acts of Congress providing for the acquisition of the improvement and the deed conveying the same to the United States, which I have already referred to, do not show that such assumption was made, and, as already observed, there does not appear to be any statutory provision of the State of the character just described.

Upon the foregoing considerations, I am of opinion that the United States are not under any liability to maintain the draw-bridge across the Portage Canal to which the inquiry refers.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. ALEXANDER RAMSEY,
Secretary of War.

KANSAS SCHOOL-LAND GRANT—INDEMNITY.

By article 2 of the treaty of December 29, 1835, with the Cherokee tribe of Indians, certain lands, now situate within the boundaries of the State of Kansas, estimated to contain 800,000 acres, were sold and conveyed to said tribe in consideration of \$500,000. Subsequently, by the treaty of July 19, 1866, with said tribe, the same lands (known as the "Cherokee neutral lands") were ceded to the United States in trust to be sold for the benefit of said Indians, and in accordance with that treaty and the supplemental treaty of April 27, 1868, were surveyed and subdivided as are the public lands, and sold, and the proceeds placed to the credit of said Indians. *Held*, (1) That under the sale and conveyance by the treaty of 1835 the Cherokee tribe of Indians acquired a title in fee-simple to the said lands, which thereupon ceased to be public lands of the United States; nor did they afterwards become public lands by reason of their cession to the United States by the treaty of July 19, 1866. (2) That neither section 34 of the act of May 30, 1854, chap. 59 (which *reserved* for school purposes the sixteenth and thirty-sixth sections in each township of public lands in the Territory of Kansas, when the same were surveyed preparatory to bringing them into market), nor section 3 of the act of January 29, 1861, chap. 20 (which *granted* to the State of Kansas "sections numbered 16 and 36 in

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every township of public lands in said State" for the use of schools, and provided for indemnity "where either of said sections, or any part thereof, has been sold or otherwise disposed of"), could have any effect upon the said lands of the Cherokees. (3) That the State of Kansas is not entitled, under the provisions of the school-land grant contained in the act of January 29, 1861, to indemnity for the sixteenth and thirty-sixth sections falling within townships into which the said lands of the Cherokees were subdivided and sold as aforesaid.

The United States, by treaty with the Delaware Indians dated September 24, 1829, granted to that tribe certain lands lying in the fork of the Kansas and Missouri Rivers, and now within the boundaries of the State of Kansas, for their permanent residence, pledging "the faith of the Government to guarantee to the said Delaware nation forever the quiet and peaceable possession and undisturbed enjoyment of the same against the claims and assaults of all and every other people whatever." By a subsequent treaty, which took effect July 17, 1854, the same tribe ceded to the United States all of said lands (excepting a certain part theretofore sold to the Wyandots, and also excepting a certain other part specifically described) to be surveyed and sold, the proceeds, after deducting cost of surveying, &c., to go to the tribe. The lands thus ceded were surveyed, and were principally sold during the year 1856; and afterwards, under the provisions of a treaty with the Delawares, dated May 30, 1860, a portion of the tract excepted from the cession of July 17, 1854, and retained by the Delawares, was sold to the Leavenworth, Pawnee and Western Railroad Company. The whole of the lands sold under the treaties of 1854 and 1860 contained upwards of thirty townships. *Held*, (1) That the grant to the Delawares, by the treaty of 1829, conveyed only a right of occupancy (i. e., the ordinary Indian title), the fee remaining in the United States—the lands thus continuing to be public domain, but subject to the Indian title. (2) That the lands covered by that grant came within the scope of section 34 of the act of May 30, 1854, chap. 59, though its operation upon them was liable to be indefinitely postponed by reason of the existence of the Indian title, or to be prevented by measures necessary to be taken in order to extinguish the Indian title. (3) That section 3 of the act of January 29, 1861, chap. 20, should be construed in connection with section 34 of the act of 1854, both sections being *in pari materia*, and that when thus construed it must be deemed that the grant to the State for school purposes made by said section 3 was meant to be as broad as the reservation for the same purposes contained in said section 34. (4) That, therefore, the indemnity provision in the *grant* applies to such sixteenth and thirty-sixth sections as constituted a part of the public domain at the date of the *reservation* and were within its scope; and hence it is applicable to sections 16 and 36 in those townships within the lands of the Delawares which were disposed of under the provisions of the beforementioned treaties of 1854 and 1860. (5) That the State of Kansas is accordingly entitled to indemnity for the sixteenth and thirty-sixth sections within the townships last mentioned.

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By a treaty with the Kickapoo Indians, dated October 24, 1832, certain lands, now within the boundaries of the State of Kansas, were set apart as a permanent place of residence for that tribe. By a subsequent treaty with the same Indians, dated May 18, 1854, those lands were ceded to the United States, saving 150,000 acres thereof, which were reserved for a future home for the tribe, and which were afterwards set off by proper metes and bounds. A part of this diminished reservation was, under the provisions of a later treaty with the same Indians, dated June 28, 1862, allotted to individual members of the tribe, and the remainder sold to the Atchison and Pike's Peak Railroad Company for the benefit of the tribe. The question being whether the State of Kansas is entitled, under the school-land grant in section 3 of the act of January 29, 1861, chap. 20, to indemnity for sections 16 and 36 within the diminished reservation thus disposed of, or to such sections in place: *Held*, (1) That the title of the Kickapoos to the lands within that reservation, when said act of 1861 was passed, was one of occupancy only (the ordinary Indian title), and the effect of the act was to grant to the State sections 16 and 36 in the reservation subject to that title; but this grant was also subject to certain rights reserved to the United States in the *proviso* to the first section of that act, by which the Government was authorized to make, and subsequently did make, other disposition of the lands by treaty. (2) That when such other disposition was made under the treaty of 1862, a case arose which is provided for in the said act of 1861, namely, of lands that have "otherwise been disposed of" by the United States, and which entitled the State to indemnity thereunder. (3) That, therefore, if the sixteenth and thirty-sixth sections within the diminished reservation of the Kickapoos are not now to be found in place, by reason of the disposition of them made as aforesaid under the treaty of 1862, the State of Kansas is entitled to indemnity therefor.

DEPARTMENT OF JUSTICE,
January 21, 1880.

SIR: Your letter of July 8, 1879, informs me that two lists of lands have been submitted to you by the Commissioner of the General Land Office for approval, aggregating 109,008.95 acres, selected by the State of Kansas as indemnity for lands alleged to have been lost by her under the grant made in the third section of an act of Congress approved January 29, 1861, entitled "An act for the admission of Kansas into the Union"; which grant is in the words following:

"First. That sections numbered sixteen and thirty-six in every township of public lands in said State, and where either of said sections, or any part thereof, has been sold or otherwise disposed of, other lands, equivalent thereto and as con-

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tiguous as may be, shall be granted to said State for the use of schools." (12 Stat., 126.)

The lands alleged to have been lost are the sixteenth and thirty-sixth sections included within tracts sold and conveyed to certain Indian tribes prior to the admission of the State into the Union, or lands sold by the United States within reservations set apart to Indian tribes for their permanent homes by treaties made prior to said grant—some of which lands were sold in trust for said Indians prior to the grant, and some have been sold since the grant was made.

The inquiry presented is, whether the State, under the circumstances above mentioned, is entitled to indemnity for sections 16 and 36 so sold and disposed of; and three classes of cases have been selected for my consideration which are deemed by you to involve all the questions that are doubtful. These may, perhaps, be considered conveniently in the order in which you have stated them.

1. *Cherokee Neutral Lands.*—By the last clause of the second article of a treaty made and entered into by and between the United States and the chiefs, headmen, and people of the Cherokee tribe of Indians, dated December 29, 1835, there was sold and conveyed to said tribe of Indians, in consideration of the sum of \$500,000, the following-described tract of land now situate within the boundaries of the State of Kansas, to wit: "the following additional tract of land, situated between the west line of the State of Missouri and the Osage reservation, beginning at the southeast corner of the same and runs north along the east line of the Osage lands fifty miles to the northeast corner thereof; and thence east to the west line of the State of Missouri; thence with said line south fifty miles; thence west to the place of beginning—estimated to contain eight hundred thousand acres of land." (7 Stat., 480.)

The lands thus sold by the United States, and purchased by said tribe, were subsequently, by the treaty of July 19, 1866 (14 Stat., 799), between the United States and said tribe, ceded in trust to the United States to be sold for the benefit of said Indians, and in accordance with the provisions of said treaty and of a treaty dated April 27, 1868 (16 Stat., 729), were sold, and the proceeds arising from such sale placed

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to the credit of said Indians in the Treasury of the United States.

The tract of land above described contains between 30 and 40 townships.

Upon this state of facts it is to be considered whether the State of Kansas is entitled to indemnity for the sixteenth and thirty-sixth sections falling within the townships into which said tract was subdivided and sold by the United States in trust for said Indians.

The effect of the conveyance by the United States to the Cherokee Nation of this tract of land upon the purchase made by them under the treaty of 1835 was to vest in the tribe a fee-simple to said tract. (*Holden v. Joy*, 17 Wall., 211.) This tribe did not hold this tract of land by the ordinary Indian title, which is one of occupancy only, which may be continued indefinitely. In such case the fee-simple to the land is in the United States. The effect of this sale was to separate distinctly the tract from the public lands of the United States, and vest it in private ownership. Nor is it perceived that any change in the rights thus acquired, or in the separation thus made, occurs by reason of the fact that afterwards the Cherokees conveyed the land to the United States upon certain defined trusts. It was no longer public land; and the only right which the United States had in it after it had been reconveyed by the Cherokees was to hold it for the purpose of the trust upon which it had been received. The conveyance in trust took place after the admission of Kansas into the Union; but the previous conveyance by the United States not only took place before that time, but before the passage of the law for the organization of the Territory of Kansas. Neither this law nor the law for the admission of the State could have any effect upon these lands, which had thus ceased to be public lands. A general argument is drawn from the intent of the United States, which has been shown by previous legislation to provide each township in the new Territories or States with a section or two sections of the public lands which may be used for school purposes; but it does not seem that the general theory upon which the United States has undoubtedly legislated, so as to make what it deemed an ample provision

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for school purposes, can be permitted to distinctly enlarge the grant made in the act of admission beyond its terms. These terms provide only that these sections shall be granted in townships of public lands in said State; and although they provide for the case of a previous disposition of the sections designated, yet by no admissible construction can they be taken to provide for such case where the lands in which the townships are located had ceased to be public before any legislation was enacted by Congress making a reservation of public domain in the Territory for school purposes. The provision for indemnity just adverted to will be more fully considered in passing upon the inquiry concerning the lands of the Delawares.

To the inquiry in this case I therefore reply that in my opinion the State of Kansas is not entitled to indemnity for the sixteenth and thirty-sixth sections falling within the townships into which the said tract, "Cherokee Neutral Lands," was subdivided, and sold by the United States in trust for said Indians.

If hereafter it shall be deemed that the townships thus separated from the public lands before the organization of either Territory or State should be provided for by grants, it seems to me that legislative action will be required for such purpose.

2. *The Delawares.*—In a treaty made and entered into between the United States and the Delaware Nation, dated September 24, 1829, it was agreed as follows: "That the country in the fork of the Kansas and Missouri Rivers, extending up the Kansas River to the Kansas line, and up the Missouri River to Camp Leavenworth, and thence by a line drawn westwardly, leaving a space ten miles wide north of the Kansas boundary line for an outlet, shall be conveyed and forever secured by the United States to the said Delaware Nation as their permanent residence. And the United States hereby pledges the faith of the Government to guarantee to the said Delaware Nation forever the quiet and peaceable possession and undisturbed enjoyment of the same against the claims and assaults of all and every other people whatever." (7 Stat., 327.)

By article 1 of a treaty made and concluded between the

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United States and the Delaware Nation, dated May 6, 1854 (10 Stat., 1048), said tribe ceded and relinquished to the United States all its right, title, and interest in and to the tract of country before described, except a certain portion of the same theretofore sold by said tribe to the Wyandot tribe of Indians, and also "excepting that part of said country lying east and south of a line beginning at a point on the line between the land of the Delawares and the half-breed Kansas, forty miles in a direct line west of the boundary between the Delawares and Wyandots, thence north ten miles, thence in an easterly course to a point on the south bank of Big Island Creek, which shall also be on the bank of the Missouri River where the usual high-water line of said creek intersects the high-water line of said river."

By articles 2 and 3 of the same treaty it was agreed that the United States should cause the lands thus ceded to be surveyed and sold, "and to pay to said tribe all the moneys received from the sales of the lands provided to be surveyed in the preceding article (article 1), after deducting therefrom the cost of surveying, managing, and selling the same." And by the eighteenth article it was provided that the treaty should become "obligatory on the contracting parties upon its ratification by the President and the Senate of the United States," which occurred on the 17th of July, 1854.

The lands thus ceded were surveyed as stipulated in the treaty, and were principally sold during the year 1856.

Subsequently, and in accordance with the provisions of the treaty entered into by and between the United States and the Delawares, dated May 30, 1860 (12 Stat., 1129), a portion of the tract above reserved was sold by the United States to the Leavenworth, Pawnee and Western Railroad Company. The tracts of land thus sold contained, when subsequently subdivided, upwards of thirty townships.

Upon these facts my opinion is requested upon the question whether the State of Kansas is entitled to indemnity for the sixteenth and thirty-sixth sections falling within said townships where the same were sold prior to the date of her grant.

The difference in the grant made under the treaty of 1829 between the United States and the Delaware Nation and that

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heretofore considered in the case of the Cherokees is obvious. The grant to the Delawares was a grant only of a right of occupancy. It conveyed what is usually termed "the ordinary Indian title"—that is, an indefinite right of occupation; but it did not convey the fee, which was with the United States.

By the treaty of 1854 the Delawares conveyed, with exceptions not now necessary to be noted, the tract of country to which they were entitled under the treaty of 1829. The same treaty provided that the United States should cause the land to be surveyed and sold, and the proceeds to be paid to the tribe. These lands thus ceded were surveyed and sold, principally during the year 1856; and, subsequently, a portion of the tract—on May 30, 1860—was sold by the United States to the Leavenworth, Pawnee and Western Railroad Company.

But it is to be observed that the treaty of 1854, though made and concluded on the 6th of May, did not take effect until the date of its ratification, which was the 17th of July following. In the meantime, by section 34 of the act of May 30, 1854, for the organization of the Territory of Kansas, it was enacted "that when the lands in the said Territory shall be surveyed under the direction of the Government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same are hereby, reserved for the purpose of being applied to schools in said Territory, and in the States and Territories hereafter to be erected out of the same." (10 Stat., 289.) At the time of this enactment the lands of the Delawares remained as they were under the treaty of 1829, the fee being in the United States subject to the Indian title of occupancy; and these lands came as much within its scope as any other part of the public domain not similarly incumbered, though its operation upon them was liable to be indefinitely postponed by reason of the existence of the Indian title, or to be prevented by measures necessary to be taken in order to extinguish that title.

In construing the grant of school lands made to the State by section 3 of the act of January 29, 1861, for the admission of Kansas into the Union, this section must be considered in connection with section 34 of the act of May 30, 1854, above

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quoted, both sections being *in pari materia*. While section 34 does not import a grant, or even such an appropriation of section 16 and 36 of the public lands hereafter to be surveyed as to place these sections beyond the future disposition or control of Congress, yet it is enacted in furtherance of the policy to which I have before alluded as early adopted by the Government, by which in laws providing for the disposal of the public domain a certain portion thereof has been set apart for educational purposes in the Territory and State in which such domain lay. The reservation of lands thereby made is to be regarded as in the nature of a dedication thereof for the purposes mentioned (14 How., 274); and, as already intimated, the whole of the public domain in the Territory to which the public surveys might afterwards be extended came within the scope of this provision—those parts of it which were then encumbered by the Indian title of occupancy as well as those parts not thus encumbered. Subsequent legislation by Congress, during the existence of the Territory, does not indicate any design on the part of that body to make the provision less comprehensive. On the contrary, we find that by the resolution of March 3, 1857 (11 Stat., 254), which is also *in pari materia*, provision is made for the selection of other lands in lieu of sections 16 and 36, where these sections shall have been “reserved for public uses” before the survey thereof, or where, before the survey, settlements shall have been made upon them or they shall have been selected or occupied as town-sites in conformity with law. Here Congress appears to have been solicitous to preserve, for educational purposes, in the Territory and future State, the same liberal provision which was contemplated in the reservation made by the act of 1854, by securing for those purposes, in the contingencies mentioned in the resolution, the same proportion of the public domain which was thus contemplated to be applied thereto. When, therefore, section 34 of the act of 1854 is taken in connection with section 3 of the act of 1861—at the same time bearing in mind that each was enacted in furtherance of the same policy, and for the promotion of the same object—it must be deemed that the grant to the State by the latter section was meant to be as broad as the reservation contained in the former section. Hence the words in the grant, “where

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either of said sections, or any part thereof, has been sold or otherwise disposed of," are to be understood as including such sections as may have constituted a part of the public domain at the date of the reservation, and which came within its scope. Agreeably to this construction, the townships embraced within the lands of the Delawares, which lands, as already observed, were within the scope of the reservation in the act of 1854, and all of which were afterwards disposed of under the provisions of the beforementioned treaty of that year, are so far within the operation of the grant to the State as that the selection of other lands in lieu of sections 16 and 36 in those townships, so disposed of, is thereby authorized.

I am therefore of opinion that the State of Kansas is by law as it at present stands entitled to indemnity for the sixteen and thirty-sixth sections falling within the townships of the Delaware reservation.

3. *Kickapoos*.—By article 2 of a treaty made and entered into by and between the United States and the Kickapoo tribe of Indians, dated October 24, 1832, a certain tract of land situate in the State of Kansas, therein described, was set apart to said tribe "as their permanent place of residence as long as they remain a tribe." (7 Stat., 320.)

By article 1 of a treaty made and entered into by and between the United States and said tribe of Indians, dated May 18, 1854 (10 Stat., 1078), the land set apart and made a reservation for said Indians by the treaty of 1832, above mentioned, were ceded to the United States by said tribe of Indians, "saving and reserving, in the western part thereof, one hundred and fifty thousand acres for a future and permanent home, which shall be set off for, and assigned to, them by metes and bounds."

Subsequently to making the treaty last above cited, the diminished reservation, containing 150,000 acres, was set apart and established by proper metes and bounds.

In accordance with the first, second, and third articles of a treaty made and entered into by and between the United States and said tribe of Indians, dated June 28, 1862 (13 Stat., 623-4), a portion of the diminished reservation above mentioned was set apart and allotted to individual members of said tribe, and in accordance with the fifth article of said

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treaty that part of the reservation not allotted was sold to the Atchison and Pike's Peak Railroad Company in trust for said Indians, and the moneys arising from such sales placed to the credit of said Indians.

Your inquiry is whether the State of Kansas is entitled to indemnity for the sixteenth and thirty-sixth sections thus sold and disposed of without further legislation, or must she take such sections in place.

The title of the Kickapoo Indians was that of indefinite occupancy only when the act for the admission of Kansas was passed. The effect of that act was to make a grant of the fee in the sections in question subject to the Indian title of occupancy, and when that title was extinguished the right of the State could be asserted. (*Beecher v. Wetherby*, 95 U. S., 517; *Ballou v. O'Brien*, 21 Mich., 304.) If, therefore, the treaty of June 28, 1862, had not been made between the United States and the Kickapoos, and the Indian title had been extinguished, the State would have found and taken these lands in place. This treaty was, however, made subsequently to the admission of Kansas as a State, and the language of the act of admission contained in the proviso to the first section indicates an intention that the grant to the State is one which is not absolute. It was subject to the rights which the United States reserved to itself, to make such treaties with the Indians as it might deem necessary. The proviso is as follows:

"Provided, That nothing contained in the said constitution respecting the boundary of said State shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with such Indian tribe, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any State or Territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the State of Kansas, until said tribe shall signify their assent to the President of the United States to be included within said State, or to affect the authority of the Government of the United States to make any regulation respecting such Indians, their

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lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to make if this act had never passed."

As one of the most important transactions between the United States and this tribe would concern the disposition of the lands, it must be held that the grant to the State was liable to be defeated upon the making by the United States of a treaty with the Indians which should dispose of these lands. Such a treaty was actually made, and was sufficient to convey the title to the lands, or enable it to be conveyed. But as these lands were in fact public lands at the date of the grant, though subject to the Indian title of occupancy, and the right was reserved to the United States to dispose of them by treaty, such right when exercised would entitle the State to proper compensation for them. In my opinion, therefore, if the sixteenth and thirty-sixth sections in the lands of the Kickapoos are not now to be found in place by reason of the treaty heretofore mentioned, the State is entitled to indemnity therefor.

It has been suggested (and the suggestion is applicable alike to the two latter classes of the lands which we have been considering—those of the Delawares and the Kickapoos) that by the act creating the Territory of Kansas, and the act admitting her into the Union, it was provided that "The Government of the United States may make any regulation respecting such Indians, their lands, property, or rights, by treaty, law, or otherwise, which it would have been competent to make if this act had never passed"; and that this provision indicates an intention on the part of Congress to reserve to the United States the sole right to deal with the Indians within the boundaries of the State of Kansas, untrammelled by any provision in the act of admission.

Even if it be true that this does reserve such a right to the United States, it would not necessarily follow that the United States were not bound to make compensation for the lands which by its own act subsequently became the private property either of the Indians or of any other persons by grants made by it. The ordinary Indian title is to be considered. It is that of occupation; and the case of *Beecher v. Wetherby* distinctly holds that there may be a grant of such lands sub-

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ject to the Indian title. There might, therefore, have been a grant of the sixteenth and thirty-sixth sections notwithstanding these were then encumbered by the Indian title; and, upon the removal of such title, such grant would have immediate operation. When, therefore, the United States reserves to itself the right to deal with the lands of the Indians at its pleasure, and makes treaties by which they are conveyed to them or to others in fee simple, it is just to hold that the case arises which is provided for in the act of admission, namely, that of lands which have "otherwise been disposed of" by the United States. As these lands were a part of the public domain, and have been disposed of by the United States subsequently to the grant to the State, agreeably to the power which it reserved to itself when the grant was made, the State (whose grant was originally applicable to the same lands) may fairly ask indemnity therefor. Such has apparently been the construction of Congress in several acts which have been passed in relation to lands in that State. Thus the resolution of April 10, 1869 (16 Stat., 55), which has relation to the disposal of certain lands of the Osages, acquired by virtue of a treaty made between them and the United States, provides "That the sixteenth and thirty-sixth sections in each township of said lands shall be reserved for State school purposes in accordance with the provisions of the act of admission of the State of Kansas." This statute recognizes the reservation as being made in accordance with the original act, and contemplates that by the original act a grant was made affecting the lands to which the Osages possessed the ordinary Indian title. To the same effect are the statutes of July 15, 1870, sec. 12 (16 Stat. 362), and May 9, 1872 (17 Stat., 90). The tenure expressed by the ordinary Indian title is of importance in considering this question; and although lands in occupation are often spoken of as their lands, yet it is known to mean that they have the ordinary Indian title of occupancy merely, while the United States is the owner in fee.

I have not failed to observe that the first section of the act admitting the State of Kansas excepts from her boundaries any territory which by treaty with any Indian tribe was not

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without the consent of such tribe to be included within the territorial limits or jurisdiction of any State or Territory until such tribe should signify its assent to the President of the United States to be included within said State. But, unless some of the lost sections in respect of which indemnity is claimed by the State lie within territory affected by treaty provisions of that character (and I am not advised that such is the case), a consideration of the exception referred to does not seem to me to be important in the questions you have submitted.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. CARL SCHURZ,

Secretary of the Interior.

HAMILTON-BROOKS CIGAR-STAMP.

A dealer in cigars would not be liable to any penalty under existing laws (see sections 3397 and 3406 Rev. Stat.) for refusal or neglect to detach the coupons from the stamp known as the Hamilton-Brooks stamp, *at the time contemplated by that device*, should such stamp be adopted in pursuance of the provisions of section 3446 Rev. Stat., as amended by section 18 of the act of March 1, 1879, chap. 125. He would under existing laws incur liability for not destroying the stamp when the box is emptied, but not for refusal or neglect to do so previously thereto.

DEPARTMENT OF JUSTICE,

January 24, 1880.

SIR: Yours of the 5th ultimo submits this inquiry: "Is there any fine, penalty, or other punishment imposed by existing laws upon a dealer in tobacco for willful refusal or neglect to detach the coupons from the stamp known as the Hamilton-Brooks stamp at the time contemplated by the device, should that device be adopted and duly prescribed by appropriate regulations?"

The Hamilton-Brooks cigar-stamp has attached to the ordinary form of stamp as heretofore used as many coupons as there are cigars in the box to be stamped. These coupons are to be folded into the box when closed by the cigar manufacturer. When opened for sale the dealer is to detach a

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coupon for every cigar sold, so that the number of attached coupons shall always correspond with the number of cigars remaining in the box, the last coupon being detached when the last cigar is sold.

The act of March 1, 1879, chap. 125, § 18 (20 Stat., 351), amends Revised Statutes, section 3446, so as to read thus: "The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may establish and, from time to time, alter or change the form, style, character, material, and device of any stamp, mark, or label used under any provision of the laws relating to internal revenue. Such stamps shall be attached, protected, removed, canceled, obliterated, and destroyed in such *manner* and by such instruments and other means as he, with the approval of the Secretary of the Treasury, may prescribe; and he is hereby authorized and empowered to make, with the approval of the Secretary of the Treasury, all needful regulations relating thereto; and *all pains, penalties, fines, and forfeitures now provided by law relating to internal-revenue stamps, shall apply to and have full force and effect in relation to any and all stamps which may or shall be so established* by the Commissioner of Internal Revenue: *Provided*, Such stamps, or device, or instrument, or means of removal or obliteration shall entail no additional expense upon the persons required to affix or use the same."

While authority is thus conferred to prescribe the *manner* of attaching and removing stamps, none is given to change the *time* when they shall be affixed, canceled, or destroyed, and thereby to practically hasten or delay the payment of the tax. They must be placed upon the box before the cigars are removed from the manufactory (Rev. Stat., sec. 3397). They are to be destroyed when the box is emptied (Rev. Stat., sec. 3406). For not *then* destroying them, a penalty is imposed by this section.

It is only *existing* penalties that apply to stamps established under the act of March 1, 1879; *i. e.*, a penalty for not destroying the stamp when the cigar-box is emptied. Until the box becomes empty, no punishment could be imposed upon a dealer for his refusal to detach the coupons from the Hamilton-Brooks stamp.

Duty on Wrought Scrap-Iron.

The inclosures which accompanied yours are returned as requested.

Very respectfully, yours,

CHAS. DEVENS.

Hon. JOHN SHERMAN,
Secretary of the Treasury.

DUTY ON WROUGHT SCRAP-IRON.

Wrought scrap-iron, consisting of punchings and clippings from iron used in the manufacture of boiler-plates, and which has never been used otherwise than in their manufacture, is not "waste or refuse iron that has been in actual use," within the meaning of the provision in schedule E, section 2504 Rev. Stat., imposing a duty of \$8 per ton on scrap-iron.

Such punchings and clippings are dutiable under another provision of that schedule, as iron in "forms less finished than iron in bars, and more advanced than pig-iron," &c.

DEPARTMENT OF JUSTICE,
January 24, 1880.

SIR: Yours of the 14th instant, inquiring as to the legality of the assessments of duty upon wrought-iron punchings and clippings imported into Boston, per ship Milanese, by Messrs. Naylor & Co., has received immediate attention.

The facts are stated by you as follows:

"I have the honor to transmit herewith a protest of Messrs. Naylor & Co., dated Boston, the 5th ultimo, from the assessment of duty at the rate of one cent per pound, made by the collector of customs at that port, upon certain scrap-iron imported by them per ship Milanese from London. The merchandise in question consists of the punchings and clippings of boiler-plates and sheet-iron left after the process of manufacture of the boiler-plates was completed, and, except as connected with the manufacture of the original articles of which they formed a part, they have never been in use. Schedule E imposes a duty of \$8 per ton on wrought scrap-iron of every description, but provides that nothing shall be deemed scrap-iron except waste or refuse iron which has been in actual use and is fit only for remanufacture. It is conceded on both sides that this merchandise is waste or refuse wrought iron fit only for remanufacture.

Duty on Wrought Scrap-Iron.

"The appellants' claim to enter this iron at \$8 per ton was rejected by the collector under the ruling of this Department, a printed copy of which, dated November 3, 1874, is herewith transmitted.

"This rule excludes this class of iron from the category of scrap-iron, upon the ground that it had not been in actual use prior to importation. It was therefore assessed with duty at one cent per pound under the second paragraph of schedule E, providing for bar iron rolled or hammered, &c.; which also declares that all iron in slabs, blooms, loops, or other forms less finished than iron in bars and more advanced than pig-iron, except castings, shall be rated as iron in bars and pay a duty accordingly.

"There seems to be no doubt that when these punchings and clippings formed a part of a boiler plate and of sheet-iron, they were in a condition *more* advanced than iron in bars, but by the process of manufacture and their subsequent change into the character of waste or refuse iron, they would seem to be, as a commercial article, in a condition less finished than iron in bars, and more advanced than pig-iron. I have therefore to request your opinion upon the following points:

"First. Whether this iron can be properly considered iron which has been in actual use within the meaning of the law; and, secondly, if not, whether it is to be considered as iron in forms less finished than iron in bars, and more advanced than pig-iron."

My answer to the first question is in accordance with the view taken and enforced by the Treasury Department for the past six or seven years under the Secretary's ruling of November 3, 1874, mentioned by you, viz: "The iron in question consists of *new* scrap—that is, the pieces, punchings, and clippings of boiler-plates and sheet-iron—which, although fit for remanufacture only, have, however, never been in actual use prior to importation."

If it be suggested that the particles of iron constituting these scraps were used while part of the sheet or plate in making the boiler-plate, as a shoemaker uses a side of leather in making boots, cutting off and rejecting shreds and clippings of leather, the reply is, that it is the side of leather or sheet of iron that is used, and not the rejected fragments

Duty on Wrought Scrap-Iron.

of material, which are thrown aside for the very reason that they are useless, or in fact cannot be used, in the completed article manufactured.

It may be further observed that to give this meaning to the words "actual use" would practically leave nothing for them to operate upon; since, in this sense, every scrap of iron has been used, as has also the completed article, before it leaves the foundry, mill, or machine-shop.

Some force must be conceded to the word "*actual*." I take it to mean that the iron imported as scrap must have been, at some time, part of an article actually put to the use for which it was designed, and subsequently thrown aside upon the heap of waste or refuse as no longer suited to its original purpose, "*and fit only to be remanufactured.*" It must not be a colorable use, for a day, week, or month, and then capriciously rejected or laid aside for exportation; it must become refuse, because no longer *capable* of being used according to its original design, and fit *only* for remanufacture, and for nothing else.

The argument most forcibly pressed against this construction is that it makes an arbitrary discrimination between material of like character that can only be used for the same purpose. It is said that these clippings and punchings of iron are imported in a mass with old horseshoes, household utensils, &c., all designed for the foundry; fit for nothing else; bought at one price abroad, and brought in as one importation; and that it is inequitable to admit the old pots, horseshoes, &c., at \$8 a ton, and exact from \$22.40 to \$33.60 per ton on the new scrap, possessing no higher value and adapted to no different use.

The answer is, that our tariff legislation has confessedly been framed not merely to produce a revenue to defray governmental expenses, but incidentally to protect American industry and enterprise. The iron interest has always been deemed worthy of special regard. It is therefore for Congress to say what discrimination shall be made between articles apparently designed for the same or similar uses in the commerce and business of this country; and this discrimination is not to be disregarded or frittered away by subtle argu-

Duty on Wrought Scrap-Iron.

ment, because to others it may appear arbitrary or unreasonable.

A comparison of earlier and existing statutes will show that as to old and new material Congress has made this same discrimination as to old and new scrap, &c.

In the act of July 14, 1832, § 2, item thirteenth, it is provided that all scrap and old iron shall pay a duty of \$12.50 per ton; that nothing shall be deemed *old* iron that has not been in actual use and fit only to be remanufactured; and all pieces of iron *except old* of more than six inches in length, or of sufficient length to be made into spikes and bolts, shall be rated as bar, bolt, or hoop iron, as the case may be, and pay duty accordingly (4 Stat., 588). At the top of the next page (589) is found this item of the same section: "Eighteenth. On *old and scrap* lead, two cents per pound." Thus two classes of these metals are recognized, *i. e.*, old iron and lead, and scrap iron and lead—having this quality in common, that they are fit only to be remanufactured. The one is reduced to this state by use until it can no longer be applied to the purpose for which it was made, and the other by its form or condition. The act of August 30, 1842, § 4, item "third," preserves the phraseology of the second section of the prior act, except that it reduces the tariff "on all old and scrap iron" to \$10 per ton, and "on old and scrap lead 1½ cents per pound" (5 Stat., 552, top, § 4, item third, and bottom, item eighth.)

The act of July 30, 1846, § 11, schedule C, imposed 30 per cent. alike on all "iron in bars, blooms, belts, loops, pigs, rods, slabs, or other forms not otherwise provided for; castings of iron, old or scrap iron, and vessels of cast iron" (9 Stat., 45).

The act of March 2, 1861, § 7, item second, levies upon "iron in pigs, \$6 per ton." The next item is: "Third. On old scrap iron, \$6 per ton: *Provided*, That nothing shall be deemed old iron that has not been in actual use and fit only to be remanufactured" (12 Stat., 181). It might be surmised that the conjunction ("or" or "and") was accidentally omitted between "old" and "scrap" in this item, did we not find similar language used in the following section, relating to lead, upon the next page: "First. On lead in pigs and bars,

Duty on Wrought Scrap-Iron.

one cent per pound; on old scrap lead, fit only to be remanufactured, one cent per pound" (12 Stat., 182, § 8, item first).

Schedule H of the act of July 30, 1846, imposes 5 per cent. duty on "brass, when old and fit only to be remanufactured; copper, when old and fit only to be remanufactured; pewter, when old and fit only to be remanufactured."

The act of March 3, 1857, section 3, adds a new schedule (I) of goods admitted in free entry. Among them are enumerated, "bells, old, and bell metal; brass in bars and pigs, or when old and fit only to be remanufactured; copper in pigs or bars, or when old and fit only to be remanufactured; glass, when old and fit only to be remanufactured; household effects, old and in use, of persons or families from foreign countries, if used abroad by them, and not intended for any other person or persons or for sale" (11 Stat., 193-4).

The act of March 2, 1861, which speaks of "old scrap iron" and "old scrap lead" (as before noticed), preserves the phraseology of the prior statute as to "copper, when old and fit only to be remanufactured" and "pewter, when old, and fit only to be remanufactured" (12 Stat., 182), and as to "bells, old, and bell metal" (*Ib.*, 193), while it adds a qualification to the clause admitting "glass, when old, *not in pieces that can be cut for use*, and fit only to be remanufactured" (*Ib.*, 194, bottom).

The act of July 14, 1870, first introduced the language now incorporated into Revised Statutes, section 2504, schedule E, p. 466, upon which the present question arises; that "nothing shall be deemed scrap-iron except waste or refuse iron that has been in actual use and is fit only to be remanufactured" (16 Stat., 264). This statute changes the clause relating to old bells, so as to read: "Bells *broken* or bell-metal *broken*, and fit only to be remanufactured" (*Ib.*, 266), and makes a further addition to that concerning "glass *broken in pieces*, which cannot be cut for use, and fit only to be remanufactured" (*Ib.*, 267).

The reproduction of pre-existing statutes in schedule E, section 2504 Revised Statutes, shows, in addition to the provision just quoted as to scrap-iron, these as to other metals: "Old scrap lead, fit only to be remanufactured" (p. 467); "old copper fit only for remanufacture" (*Ib.*); "brass in bars or pigs, and old brass, fit only to be remanufactured" (*Ib.*).

Duty on Wrought Scrap-Iron.

In the free list the compilers have introduced both provisions of earlier statutes relating to bells, thus: "Bells, broken, and bell metal, broken, and fit only to be remanufactured"; and in the next line: "bells, old, and bell metal" (Rev. Stat., p. 483, sec. 2504). The provision relating to glass remains as last above quoted.

All this examination of prior and present legislation leads to this result: that we are to give to the phrase in question in schedule E of section 2504 of the Revised Statutes (p. 466) the force and effect which the plain and ordinary meaning of its language indicates, and exclude from the rate of duty there specified all waste or refuse iron that has not been in actual use. It may be further noticed that the earlier laws have never admitted all scrap-iron without limitation, which would be the effect here if the qualifying clauses were held inapplicable; but the size of the scrap, not old, was limited, so that it could not be cut into spikes or bolts, &c.

In reply to your second question, I would say, that, it being conceded that this scrap-iron is more advanced than iron in pigs because it has been purified, while in the mechanical process to which it was subjected it has at one time received the same finish as iron in bars, in its present condition, and as a vendible commodity (which is what concerns us), it is now "less finished than iron in bars," since it must again in the process of remanufacture, for which only it is fit, resume this form.

The conclusion to which a negative answer to your first inquiry and an affirmative to your second leads is that the proper rate of duty has been demanded by the collector at Boston, and the importer's protest is unfounded in law.

The copy of that protest which accompanied your letter is herewith returned.

Very respectfully, yours,

CHAS. DEVENS.

Hon. JOHN SHERMAN,
Secretary of the Treasury.

Employment of Indians in Co-operation with Troops.

EMPLOYMENT OF INDIANS IN CO-OPERATION WITH TROOPS.

The Navajo Indians having offered to co-operate with the United States troops against the Apaches if the military authorities will arm and subsist them: *Advised* (concurring with the view of the General of the Army) that no statutory provision exists under which said Indians can be armed and subsisted as proposed.

DEPARTMENT OF JUSTICE,

January 29, 1880.

SIR: Your letter of the 26th instant informs me that a telegram has been received from Col. Edward Hatch, dated "Santa Fé, N. Mex., January 19, 1880," stating that the Navajos have offered to co-operate with his troops against Apaches without pay if he will arm and ration them. The commanding general, Department of the Missouri, recommends the employment upon the terms suggested of a sufficient number of Navajos to put an immediate end to the Apache trouble in New Mexico.

Your letter further informs me that the General of the Army believes that the Navajos cannot be used as soldiers, to be armed and subsisted as proposed, for the reason that no item of the appropriation bill will apply to any troops but the Regular Army, limited to 25,000 men, of which number the Indian scouts form an integral part.

In this opinion I concur. The Indian scouts are provided for by section 1112 Revised Statutes. They may be enlisted to the number of one thousand men, and may be "discharged when the necessity for their service shall cease, or at the discretion of the department commander." This body of Indian scouts forms an integral portion of the Army; but no provision is made by the appropriation bill for the subsisting of any troops but those of the Regular Army. The language of the appropriation act is as follows: "For subsistence of regular troops, Indian scouts and guides, and Indian prisoners, which shall include coffee and cooked rations for troops traveling on cars and other conveyances," &c.

This reason is stated by the General of the Army in his indorsement, and seems to me quite conclusive.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. ALEXANDER RAMSEY,
Secretary of War.

Settlement with Western and Atlantic Railroad of Georgia.

SETTLEMENT WITH WESTERN AND ATLANTIC RAILROAD OF
GEORGIA.

The Secretary of War (in execution of the act of March 3, 1877, chap. 119, which authorized him "to open and readjust the settlement made by the United States Government with the Western and Atlantic Railroad of Georgia") made an award, upon which a settlement was effected with the State of Georgia. Subsequently it was claimed that an important item of credit, which should have been allowed the State in the settlement, had been ignored, and application was made in behalf of the State for a revision of the award and settlement. The Secretary declined to reopen the award and settlement for the purpose of revising the same in connection with such claim; but he decided to revise the award for the purpose of making an additional allowance of a certain sum found to be due after correcting an accountant's error against the United States, and also a mistake against the State in the computation of interest. A renewed application for revision of the award and settlement was afterwards made by the governor of Georgia, but, without taking any action thereon, the Secretary resigned and went out of office. *Held* that the succeeding Secretary of War has not power to reopen the award and settlement made by his predecessor in office, with a view to the rectification thereof, in any respect other than that which had already been directed by his predecessor, the act having been fully executed by the latter.

DEPARTMENT OF JUSTICE,
January 29, 1880.

SIR: Your letter of the 22d ultimo calls my attention to the act of March 3, 1877 (19 Stat., chap. 119, p. 402).

I have delayed my reply in order to give parties interested an opportunity to be heard, which I thought it my duty to afford them.

Your letter informs me that in the execution of the act aforesaid an award was made by your predecessor, the Hon. George W. McCrary, upon which a settlement was effected with the State of Georgia. This more fully appears by the history of the case contained in a report of the Judge-Advocate-General of June 17, 1879, which you transmit as a part of your communication.

It further appears that the Secretary subsequently refused to reopen the award for the purpose of revising it in connection with a claim that an important item of credit which should have been allowed the State in the settlement had been ignored. The Secretary, at the same time, decided to revise

Settlement with Western and Atlantic Railroad of Georgia.

the settlement for the purpose of making an additional allowance in the sum of some \$1,500, which was the amount found to be due after correcting an accountant's error against the United States, and a mistake against the claimant in this that the mode of computation of interest varied from the method adopted in crediting interest in the final settlement with the Nashville and Decatur Railroad, which the Secretary had directed should be followed as the plan in the settlement to be made under the act above mentioned.

Your letter further informs me that shortly before your predecessor's resignation took effect he received from the governor of Georgia a renewed application for a reconsideration of the settlement, and for an additional award, with a request that, if the Secretary should not feel warranted in immediately granting such application, the question of law involved should be submitted to the Attorney-General. This application was under consideration when you assumed the office.

The question which you propose is, whether you can now lawfully reopen the original award and settlement made by your predecessor under the said act with a view to a correction of any mistake of the law or misapprehension of the facts which may have affected that settlement, and especially on account of the supposed mistake in the matter of the allowance of credit for interest, which it appears to have been the desire of Mr. McCrary to correct.

In regard to reopening the award other than to the extent which your predecessor determined to reopen it, I am of opinion that that power does not now exist with the Secretary of War. The act was fully executed by your predecessor; and upon a former application to reopen the award made by him (upon which all the facts appeared which now are known to exist) he determined that he would not revise it in the respect in which we are now considering it. It seems to me that upon this statement it must be deemed that the power of the Department is exhausted; that its action is full and complete; and that, if any error has been committed, it cannot now be rectified by a reversal of the judgment of your predecessor.

It is argued on behalf of the State of Georgia that the power given by the act is not exhausted until a settlement is

Settlement with Western and Atlantic Railroad of Georgia.

made upon the basis contemplated thereby. But it is for the Department to determine when this is done, and when it has thus determined, the matter cannot be readjudicated until new authority is conferred. The citations in the brief of the Judge-Advocate-General are singularly pertinent, and might be added to were it necessary to fortify a position which is so well sustained by the authorities. Nor is the case withdrawn from the principle that when a matter has been once finally decided by a Department it is not again to be reopened by an application made subsequently by the State of Georgia, which was upon the files of the War Department when you took charge thereof. After a decision not to reopen the award, that application could have no effect until something was done under it, or it was in some way entertained by the then Secretary.

The other inquiry (to which your letter specially calls my attention) is in regard to the matter of the mistake in the allowance of credit for interest, which was apparently a mistake of computation only.

It appears that the Second Comptroller has declined to approve the account stating the additional award for interest, and has refused to reopen the settlement to that extent in the Treasury Department. Your predecessor had, however, decided to that extent to reopen it and to rectify the error; and of this decision he had notified the Treasury Department. All, therefore, has been done by the War Department which can be done in that matter. The question whether or not the Comptroller is correct in declining to recognize the additional award, and to reopen the matter, is a question pertaining to the Treasury Department only. The Department over which you preside has done its utmost to reopen the award to the extent of the interest, and no further duty can therefore be encumbered upon you in the premises.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. ALEXANDER RAMSEY,
Secretary of War.

Official Envelope.

OFFICIAL ENVELOPE.

Section 29 of the act of March 3, 1879, chap. 180, extending the provisions of sections 5 and 6 of the act of March 3, 1877, chap. 103, relating to official envelopes, does not impose upon the Executive Departments at Washington the duty of furnishing such envelopes to the various subordinate officers throughout the United States who are under their supervision, but whose offices are not offices in those Departments, ~~excepting~~, of course, cases where that duty is required by other statutory provisions than those above mentioned.

Where the envelopes are not furnished by the Departments, they may be prepared for their own use by the officers contemplated in section 29 of said act of March 3, 1879. The statute does not require that the penalty, &c., on such envelopes should be printed rather than written.

DEPARTMENT OF JUSTICE,
January 30, 1880.

SIR: In answer to yours of the 31st ultimo, referring to the penalty-envelopes, I respectfully reply, that in an opinion delivered to your Department on May 16, 1877, I expressed the opinion that the fifth section of the act of March 3, 1877, which provided for the use of penalty-envelopes by the Departments and their bureaus or offices, related to those bureaus or offices which formed a portion of an Executive Department and were thus Departmental in character. I further suggested that the sixth section, which used the words "Executive Departments" and the phrase "and its subordinate offices" used "subordinate offices" by reference to the fifth section, and included only offices of the character there contemplated. For a full discussion of this question I would refer you to that opinion.

The effect of the twenty-ninth section of the act of March 3, 1879, was to extend the right to use the penalty-envelope to officers of the United States Government in their official correspondence with the Executive Departments or other officers of the Government, and to the Smithsonian Institution on all official matter sent out by it; but no portion of that section can be interpreted as adding to the duty of the Executive Departments in providing the necessary penalty-envelopes. Its full effect and object are carried out when there is given to the various officers of the United States, and to the officers of the Smithsonian Institution in a limited

Official Envelope.

degree, the right to use these envelopes. If its effect were to compel the Executive Departments to provide for all the officers who are not Departmental in their character the penalty-envelopes, it would to that intent diminish the Departmental fund and increase the emoluments of many of these officers who are entitled to receive no allowance for stationery.

In the letter of the Assistant Postmaster-General, embodying the opinion of the Assistant Attorney-General, I observe that he states that "section 29 of the act of March 3, 1879, extending the provisions of sections 5 and 6 of the act of March 3, 1877, does not in any way limit the requirements of section 6 of the latter act, that the penalty-envelopes should be provided by the Executive Department of the United States for itself and its subordinate *officers*."

A recurrence to the text of the sixth section will show that the word used is not "officers," but "offices"; and this is important, because that section is connected with the fifth section, in which the bureaus or offices are spoken of in such a way that the offices must be considered Departmental in their character.

The inquiry of your letter is, whether the ruling that "the penalty-envelopes prescribed under this and the two preceding sections must be furnished by the various Departments at Washington to their subordinate officers throughout the country" is a proper construction of the law relating to this subject.

I reply that, in my opinion, it is not necessary that this should be done, excepting always those cases where it is required by other statutes than those which we are now considering. The sense in which I understand you to use the words "subordinate officers" is "officers not Departmental in their character." The effect of the twenty-ninth section of the act of March 3, 1879, was to extend the privilege of using these envelopes to such officers; but it did not impose upon the Executive Departments the additional duty of providing them. Therefore, if such are not furnished by the various Departments, they may properly be prepared by the officers contemplated by that section, and may then be used.

There is no requirement, as suggested in the letter of the

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Assistant Postmaster-General, that they should be printed rather than written.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. DAVID M. KEY,
Postmaster-General.

IOWA RAILROAD LAND-GRANT.

By act of May 12, 1864, chap. 84, a grant of lands was made to the State of Iowa to aid in the "construction of a railroad from a point at or near the foot of Main street, South McGregor, in said State, in a westerly direction, by the most practicable route, on or near the forty-third parallel of north latitude, until it shall intersect the said road running from Sioux City to the Minnesota State line, in the county of O'Brien, in said State." Subsequently, in 1864, a map was filed in the General Land Office designating the general route of the road from McGregor to a point in O'Brien County, so as to form a junction with the line of the proposed road from Sioux City to the Minnesota State line. In 1869 a partial change in the location of the road was made by direction of the Commissioner of the General Land Office, and the location thus made, from the point where it departed from the location of 1864 on to the western terminus, became the recognized line of the road by the Interior Department west of that point, and the public lands along the same were accordingly withdrawn. The road, however, having since been constructed upon a line different from the line located in 1869, the question considered is, whether, assuming that the location of 1869 was the definite location of the line of the road, but that the road has been constructed upon a different line, the State is entitled to the benefit of the grant; and, if so, then whether, in adjusting the grant, the line of definite location is to be regarded, or the line upon which the road was actually constructed. *Held* that, in contemplation of the statute, the road was to be constructed upon the line of definite location; that the effect of such location, when made, is to give precision to the grant, and to define the limits within which the lands granted could be at once ascertained by the public surveys; and that whatever adjustment of the grant is made must therefore be made according to the line of definite location of the road. Yet *held*, further, that if the road has not been constructed on the line of its definite location—and it is for the Secretary of the Interior to determine whether or not the road has been constructed on that line—the State is not entitled to the benefit of the grant, although the line of the constructed road would answer the terms of the grant had it been the line of definite location.

Whether deflections from the line of definite location, made in the actual construction of the road, have identified it with a different line, or

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whether in its construction there has been substantial conformity to the line of definite location, is a matter for the Interior Department to determine. But *advised* that where the deflections are in their character immaterial—*e. g.*, if made for the purpose of avoiding engineering obstacles which could not otherwise be avoided without enormous expense, or of remedying defects in the original location—such deflections would not destroy the identity of the constructed road with the line of definite location.

DEPARTMENT OF JUSTICE,
February 2, 1880.

SIR: In regard to the question submitted by your letter of the 7th instant, the following facts appear:

By an act of Congress approved May 12, 1864, there was granted to the State of Iowa, "for the use and benefit of the McGregor Western Railroad Company, for the purpose of aiding in the construction of a railroad from a point at or near the foot of Main street, South McGregor, in said State, in a westerly direction, by the most practicable route, on or near the forty-third parallel of north latitude, until it shall intersect the said road running from Sioux City to the Minnesota State line, in the county of O'Brien, in said State, every alternate section of land designated by odd numbers for ten sections in width on each side of said roads; but, in case it shall appear that the United States have, when the lines or routes of said roads are definitely located, sold any section or any part thereof granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected, for the purposes aforesaid, from the public lands of the United States nearest to the tiers of sections above specified, so much land in alternate sections, or parts of sections, designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated," &c. (13 Stat., 72).

This grant was accepted by the State of Iowa by an act of her legislature dated April 20, 1866, and so much of it as pertains to the line of road now under consideration conferred upon the McGregor and Western Railroad Company.

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Prior to the date of such acceptance, on August 30, 1864, said company filed in the General Land Office a map, designating the general route of its road from McGregor to a point in O'Brien County, so as to form a junction with the proposed line of the road from Sioux City to the south line of the State of Minnesota.

On January 27, 1869, the McGregor and Sioux City Railroad Company, the successor of the McGregor and Western Railroad Company, filed in the General Land Office a duly certified map of the definite location of the line of its road from a point in section 12, township 95, range 35, to a point in section 18, township 96, range 38.

On September 2, 1869, said Company filed another map of the definite location of its road from a point in section 18, township 96, range 38, to the point of intersection with the Sioux City and Saint Paul Railroad.

Both of these two latter maps show a change of the line of the road from the one as originally located.

An examination of the diagram accompanying your letter will show that the western terminus of the line of road as originally located is a few miles to the southeast of Sheldon, the point where the road from Sioux City to the south line of Minnesota enters O'Brien County.

A withdrawal of lands was made on the lines of the road as represented upon the diagram referred to in accordance with the terms of the granting act.

Between the dates of the filing of the two last mentioned maps on March 27, 1869, the McGregor and Sioux City Company asked leave to change the line of its road as located in 1864 west of range 27. The reason for asking this change was stated as follows: "This change becomes necessary for them to make by reason of the Sioux City and Saint Paul Railroad having changed their line northerly and westerly so as to make the point of intersection nearly four townships more northerly and westerly than the originally proposed or supposed point of intersection. To this end we beg permission to file a new map showing our location changed as proposed, or to amend the one already on file."

With this request a map was filed designating the line of

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proposed route nearly identical with the line of road as constructed.

Under date of May 10, 1869, your predecessor, Hon. J. D. Cox, declined to comply with this request for the following reason, viz:

"After a road has been definitely located, the map thereof filed here and accepted, and the lands withdrawn, no specific authority is given whereby this Department can accept another location; and, in the absence of such authority, I must decline to give my approval to the map now presented."

Notwithstanding this decision, the map filed in January preceding was permitted to remain on file as designating the line of road thereon delineated, and an additional map was accepted in September following to complete said line to its junction with the Sioux City and Saint Paul Railroad Company.

The road not having been completed by either of the first two companies upon which the grant was conferred further west than Algona, township 95, range 29, within the time required by law, the State resumed the grant, and by act of her legislature dated February 27, 1878, conferred it upon the Chicago, Milwaukee, and Saint Paul Railroad Company.

By the latter act said company was required to construct the road from Algona to Emmettsburg, and thence by way of Spencer to a point of connection with the Sioux City and Saint Paul Railroad at the town of Sheldon.

An examination of the diagram mentioned will show that in order to reach the point above named the road must deviate from one to five miles from the lines of definite location as designated on the maps filed in the General Land Office in 1864 and 1869, on which the lands were and still remain withdrawn. This entire line of road, however, has been constructed, and the State, through her proper agents, now asks that the lands inuring to her under said grant may be patented.

In his letter of the 19th ultimo the acting Commissioner of the General Land Office, in submitting a report in relation to the application of the State for a patent of the lands inuring to her under this grant, says: "It is well known that many of the railroads built by aid of land grants have departed in

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a greater or less degree from the lines as adopted and definitely fixed, and that the adjustment of such grants have proceeded without reference to any deflections the grantees saw proper or necessary to make; but the rulings and decisions upon the subject by this office have been to the contrary, invariably declining to authorize any material or important deviation from the adopted routes. And these decisions cover a period of more than twenty years, and so far as I have been able to determine are uniform in this expression."

Your communication submits the question whether in adjusting the grant above mentioned the State is entitled to demand and receive, as granted and indemnity lands, lands within ten and twenty miles of the line of said road as definitely located, or whether she must take such lands within ten and twenty miles of the road as constructed.

Your subsequent letter of the 20th instant refers to that of the 7th, submitting a statement of facts upon the grant to the State of Iowa approved May 12, 1864, to aid in the construction of two lines of railroad therein mentioned, and makes an additional statement of facts not mentioned in that letter, and at that time not known to the officers of your Department. You inclose in the later letter a brief of the counsel for the railroad, and a copy of the report of the Commissioner of the General Land Office, to whom the same had been referred.

From that report it appears that the change of location of the line of said road made in 1868 and 1869 was made by direction of the Commissioner of the General Land Office, and not simply on the election of the company then claiming the grant made to the State so far as it had reference to that road. It also appears that since said locations of 1868 and 1869 were made the line as marked out by them from the point where it departs from the location of 1864 has been the recognized line of said road by your Department, and the lands along the same have been withdrawn from it. The road, however, has not been constructed on the line as thus changed; and although the change made in 1868 and 1869, so far as the company is concerned, seems to have been fully justified, having been directed by the Commissioner of the General Land Office, it does not appear in your opinion to affect the question submitted in your previous letter. That question you restate in

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the following terms: "Whether, under the grant, the company, after having located its line either by the direction of this office or upon its own selection, and the lands having been withdrawn on the line so directed or selected, may build its road on a different line and demand and receive the lands which would have inured to the grant on the line as located."

Taking your communications together, they apparently submit two questions:

1. Whether, assuming the road to have been definitely located according to the location of 1868 and 1869, and to have been constructed upon a different line, the State is now entitled to the benefit of the grant.

2. Whether, in adjusting the grant (if it be entitled to the benefit thereof), the line of definite location is to be regarded, or the line upon which the road was actually constructed.

These inquiries dispense with any consideration of whether the steps preliminary to the location of 1868 and 1869 were regular, and assume that to have been the line of definite location.

It is suggested by the counsel for the road, both in their brief and in the oral argument, that as there are not sufficient public lands east of Algona to satisfy the grant with reference to the line constructed to that place, the State has a right to select lands west of the same in lieu thereof. But that is not the question presented for my consideration, and I have deemed it unnecessary to discuss it, as I desire to confine myself to the inquiries proposed by you.

The location made in 1868 and 1869 was one definite in its character. It was not a preliminary location, which is provided for in certain other acts. Its effect, when made, was to give precision to the grant to the State, and to define the limits within which the lands granted could be at once ascertained by the public surveys. Whether this is to be treated as an inchoate or a defeasible title is not important. It was not a perfect and absolute title, and could not become so except upon the completion of the road, which alone could entitle the State to a patent. The law clearly contemplated that the road was to be constructed according to the line of definite location. For this purpose lands along it were withdrawn from the market, and public information given by

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which parties purchasing property in the vicinity were to be governed. The lands in question were separated and set apart from the public domain, and the adjustment of the grant was to proceed according to the line thus definitely located. Whatever adjustment, therefore, of the grant is made must be made according to the line of definite location. To hold that the grant could be adjusted according to a different and distinct line, upon which a road perhaps answering in general terms the description given in the granting act might be constructed, would be to hold that there were actually two grants of land. It cannot be possible that the grantee, having made his grant definite, and having had the lands granted separated from the public domain, can take it up and relocate it so as to appropriate other lands. The grant lost its character of a float by the definite location. It is therefore necessary, in adjusting the grant, that it should be adjusted according to the line of definite location.

The other inquiry is whether, if the road be built upon a different line from that of definite location, the lands ascertained by the definite location can now be patented to the State.

If this could be done, its effect would be sufficiently obvious. A tract of country not receiving the benefit of the road would be charged with the burden of having its lands granted to the railroad company whose road did not accommodate it. Persons owning property in farms or villages, who had purchased with the belief that the road was to be constructed according to the line of definite location, would find that they were in some instances many miles distant from the road, the benefits of which they had expected to receive.

In order to entitle the State to the benefit of the lands granted, it is necessary that the road should be constructed according to the line of definite location. If a different road be constructed than that definitely located, it cannot entitle the State to the benefit of those lands.

The question whether the road constructed is or is not the road as definitely located is a question for the Interior Department to determine, in this as in other cases, and one which must be largely within the discretion of the Secretary. Some deflections must in many cases be expected from the

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line of the road as definitely located; but it is for the Department to determine whether or not these make of it a different road, or whether there is substantial compliance with the line of definite location. In the exercise of this discretion it is impossible to lay down any legal rules which could govern in all cases. Deflections which in certain cases might be held not to change the character of the road as definitely located, might do so in others. I would suggest that if the deflections be in their character immaterial—if they were made for the purpose of avoiding engineering obstacles which could not otherwise be avoided without exaggerated expense, or to remedy defects in the original location—that such deflections would not destroy the identity of the road constructed with the road of definite location. Upon the whole matter, it will be the duty of the Secretary of the Interior to decide whether the road constructed is the road as definitely located.

It is suggested that the governor having made his certificate under the fourth section of the granting act, the Secretary of the Interior cannot inquire whether the road is or is not constructed according to the line of definite location; that the governor is the sole judge of the compliance of the company; that when his certificate is filed the right to the patents is perfect; and that no map of the constructed line is anywhere required.

The reason why no map of the constructed line is required is because it is contemplated throughout the act that the road is to be constructed according to the line of definite location; and while it may be true that the right to the patents depended originally upon the road being made in accordance with the requirements of the act, and that many different lines might have been selected which would have met those requirements, yet when the grant has acquired precision by the line of definite location it is unimportant that another line might originally have been selected. In terms the act of Congress does not impose upon the Department the duty of inquiring as to whether the road has been constructed on a different line from that of definite location. But the Secretary must determine that the road has been constructed. The responsibility of issuing patents clearly

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imposes on him that duty, and, as a necessary incident, the duty of determining that the road has been constructed as located.

It has been further suggested that, inasmuch as the deflections from the definitely located line were caused by an act of the State of Iowa, which required it to be constructed upon a different line, the State is entitled to the lands according to the line as originally located.

But while the State had a right to resume the grant and did so, and while it could confer such grant upon another grantee as it did, it could not change the rights of the United States. It could not obtain a new grant by changing the line of the road, nor could it perfect the original title by constructing the road according to a line different from that of the definite location.

In explicit answer to your inquiries, I therefore reply that the grant must be adjusted according to the line of definite location, and that it is for the Department to determine whether or not the road has been constructed according to such line; and that, if a different road has been constructed, although it would answer the terms of the granting act if it had been the line of definite location, it still will not entitle the State to the benefit of the grant.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. CARL SCHURZ,
Secretary of the Interior.

FORT BROWN, TEXAS.

In 1853 certain proceedings were instituted in the district court for Cameron County, Texas, under an act of the legislature of that State, for the purpose of acquiring title to the site of Fort Brown, Texas, then occupied by the United States as a military post; but no authority for the institution of these proceedings was ever given by Congress. The value of the land was assessed by verdict of a jury at \$50,000, but no judgment was then entered up. Long afterwards, on February 20, 1879, the court rendered a judgment, based on the verdict of the jury in 1853, for the sum above mentioned, with interest thereon from the year 1853. Suggestion being made that steps should now be taken in behalf of the United States to have the judgment annulled by a superior court:

Fort Brown, Texas.

Advised that this is unnecessary, for the reason that, as no officer of the United States had authority to institute or appear in said proceedings and submit its rights to adjudication, the Government cannot be bound by them, and that proceedings to oust the United States from the possession of the premises could not be maintained.

DEPARTMENT OF JUSTICE,
February 6, 1880.

SIR: Referring to your letter of the 24th ultimo, relative to the interest of the Government in the lands upon which is situated Fort Brown, in the State of Texas, you suggest that the matter should be investigated by the Department of Justice, and transmit the papers in the case, among which is a letter from Mr. W. H. Russell, of Brownsville, to General Ord, with the suggestion that Mr. Russell should be retained as counsel, and that a writ of error should be obtained from the judgment of the district court of Cameron County of February, 1879.

I have carefully examined the memorial presented to the President, the letter of Mr. Russell, and the other voluminous papers which accompanied your communication.

The facts in regard to this military reservation, and the proceedings by which title is attempted to be asserted, may, I think, be briefly condensed as follows:

Fort Brown being in actual occupation of the United States forces as a military post in 1853, certain proceedings were instituted by an officer of the United States—General Van Vliet—alleged to be for the purpose of acquiring title to the said Fort Brown reservation. It was instituted under an act of the legislature of Texas in the State district court for Cameron County. Apparently no judgment was entered, although a jury rendered a verdict assessing the value of the land at \$50,000. No decision was made as to whether Señora Cavazos or the city of Brownsville was the owner of the property, nor was any decree made awarding the title to the United States. The proceeding apparently was in many respects irregular and incomplete; but it is sufficient for the present purpose to say that it was not one by which the United States could be bound, for the reason that no authority was ever given by Congress for the initiation of such a proceeding. It is not competent for an officer of the United States to submit its

Fort Brown, Texas.

rights to adjudication unless he has distinct authority for the purpose.

In 1875 an appropriation was made for the purchase of the site of Fort Brown in the sum of \$25,000 (18 Stat., 391). In June, 1876, by a proceeding in the United States circuit court, between the city of Brownsville and Maria Josefa Cavazos and others, the title to this tract of land was apparently settled to be in Señora Cavazos, which decision was affirmed at the present term of the Supreme Court of the United States.

In 1878 proceedings were instituted by Maj. David R. Glendenning, Eighth Cavalry, making Señora Cavazos, the city of Brownsville, and others, defendants, to appraise this land. The city plead in bar to the proceeding the entry on the minutes of 1853, and this plea was sustained. The effect of this was of course to leave the Government out of the case, assuming that it had been in it; but, for the reason before stated in regard to the original proceeding by General Van Vliet, the Government was no party to the case, as Major Glendenning was not authorized by any law of the United States to submit its rights to adjudication, or commence such a proceeding.

Thereafter, on February 20, 1879, the State district court of Cameron County rendered a full and complete judgment on the basis of the verdict rendered by the jury in 1853, for the sum of \$50,000, with interest thereon from November 29, 1853. It is suggested by Mr. Russell that this judgment, if effort is made to vacate it, cannot stand, because of the want of notice to the Government, and because it was made on *ex parte* affidavits, &c.; also because the only evidence of notice to the Government was an affidavit that notice had been mailed at Brownsville on February 12 to Lieutenant Leggett, who had represented the Government as counsel in the proceeding of Major Glendenning of 1878.

These reasons would be sufficient for vacating the judgment; but I do not think any proceeding in this regard is necessary, for the reason which I have heretofore stated, that no officer of the United States has ever appeared in any of these proceedings by authority of law to represent its rights or submit them to adjudication. The matter stands, therefore, to-day as if nothing had been done by the United States.

Superintendent of National Cemetery.

Apparently the title to these premises, originally in Mrs. Cavazos, belongs to her devisee. In this view, should P. G. Cavazos, the devisee, be disposed to accept the sum of \$25,000, it will be a matter of inquiry (which I have not yet considered) whether that is now a continuing appropriation, so that the Secretary of War can use it for the purchase. If, on the other hand, he is not so disposed, it will be for Congress to determine whether it will make a larger appropriation, whether it will authorize proceedings for the condemnation of the property by one of its officers, and whether it will either make any appropriation for or authorize any adjudication of the question whether or not the Cavazos estate is entitled to anything for the use and occupation of these premises for which a claim has been made.

In regard to any proceedings to oust the United States from the possession of these premises, I am clearly of opinion they could not be maintained. (*Carr v. The United States*, 98 U. S., 433.)

At present it would not seem that the employment of Mr. Russell is necessary; but your suggestion that if further proceedings in Texas are desirable it would be proper to employ him is certainly worthy of much consideration, as Mr. Russell's communications show very intelligent comprehension of the whole of this complicated affair.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. ALEXANDER RAMSEY,

Secretary of War.

SUPERINTENDENT OF NATIONAL CEMETERY.

The superintendent of a national cemetery, over which the State has ceded jurisdiction to the United States, and within the limits of which he resides, is exempt from the duty devolved by the State upon all male persons between certain ages to work on the public roads. Otherwise if the State has not ceded jurisdiction, or if the superintendent resides elsewhere within its jurisdiction.

DEPARTMENT OF JUSTICE,

February 7, 1880.

SIR: A letter from your Department of October 13, 1879, submits the question whether the superintendent of the Na-

Superintendent of National Cemetery.

tional Cemetery at Lebanon, Ky., under the State law requiring all male persons between certain ages to work on the public roads, can legally be required to perform such labor.

The office held by the superintendent has heretofore been decided by me to be a civil office; and, in such capacity, he is not exempt from the usual burdens, and is entitled to the usual privileges, of a citizen. If, however, he resides upon territory acquired by the United States, over which the State of Kentucky has parted with its jurisdiction, he would be exempt for that reason.

It has been held by the supreme court of Massachusetts that "persons who reside on lands purchased by, or ceded to, the United States for navy-yards, forts, and arsenals, and where there is no other reservation of jurisdiction to the State than that of a right to serve civil and criminal process on such lands, are not entitled to the benefits of the common schools for their children in the towns in which the lands are situated; nor are they liable to be assessed for their polls and estates to State, county, and town taxes, in such towns; nor do they gain a settlement in such towns, for themselves or their children, by residence for any length of time on such lands; nor do they acquire, by residing on such lands, any elective franchise as inhabitants of such towns." (1 Metcalf, 580.)

This decision is cited by Attorney-General Cushing with approval in 6 Opin., p. 577, where he holds that "the persons, in the employment of the United States, actually residing in the limits of the armory at Harper's Ferry, do not possess the civil and political rights, nor are they subject to the tax and other obligations, of citizens of the State of Virginia."

In that case, as in the case in Massachusetts, jurisdiction had apparently been ceded to the United States by the State.

Whether, therefore, the superintendent is properly to be required to perform the duty devolved upon all male citizens of the State of Kentucky between certain ages will depend upon the inquiry whether jurisdiction over the cemetery (on whose lands I assume him to reside) has or has not been

Cherokee Lands—Removal of Intruders.

ceded by the State to the United States. Upon this point no information is given by the letter.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. ALEXANDER RAMSEY,
Secretary of War.

CHEROKEE LANDS—REMOVAL OF INTRUDERS.

Under article 16 of the Cherokee treaty of 1866 the lands west of the ninety-sixth degree of longitude, to which it refers, are reserved to the United States, upon the conditions there named, for the settlement thereon of tribes of friendly Indians. The possession of and jurisdiction over these lands until thus disposed of, which are retained by the Cherokee Nation under the same article, give to that nation no right to settle its citizens upon the lands so long as the right reserved by the United States to settle friendly Indians thereon subsists. Hence authority to settle there, derived from the Cherokee Nation, is not sufficient.

Held, accordingly, where certain persons claiming to belong to the Cherokee Nation attempted to settle upon the lands mentioned, that their removal therefrom by the military authorities was justifiable.

DEPARTMENT OF JUSTICE,

February 25, 1880.

SIR: Communications from your predecessor, dated July 11 and 18, 1879, request my opinion in relation to the then recent removal by the military of one J. W. Bell and others, attempting to settle upon the Cherokee lands west of 96°.

Part of these persons so attempting settlement it appears were white persons, and others half-breed Cherokees. It appears, also, that Bell claimed to have authority from the Department of the Interior for such settlement. But no such authority was produced.

So far as concerns persons who belong to the white race, and make no claim to Cherokee citizenship, there is of course no question. They must be considered as trespassers or intruders, and the Government is under treaty obligations to remove them. The question proposed by the War Department is whether, assuming Bell to be a citizen of the Cherokee Nation, he was a trespasser upon the lands mentioned and was rightfully expelled.

Cherokee Lands—Removal of Intruders.

The question is to be answered by reference to the provisions of the 16th article of the Cherokee treaty of 1866, which are as follows:

1. "The United States may settle friendly Indians in any part of the Cherokee country west of 96°, to be taken in a compact form in quantity not exceeding 160 acres for each member of said tribes thus to be settled; the boundaries of each of said districts to be distinctly marked, and the land conveyed in fee simple to each of said tribes, to be held in common or by their members in severalty as the United States may decide.

2. "Said lands thus disposed of to be paid for to the Cherokee Nation at such price as may be agreed on between the said parties in interest, subject to the approval of the President; and if they should not agree, then the price to be fixed by the President.

3. "The Cherokee Nation to retain the *right of possession of and jurisdiction over all of said country west of 96° of longitude until thus sold and occupied, after which their jurisdiction and right of possession to terminate forever as to each of said districts thus sold and occupied.*"

The fair interpretation of this article would seem to be that the lands to which it refers were absolutely reserved to the United States, upon the conditions therein named, for the settlement thereon of tribes of friendly Indians. The jurisdiction and possession of the Cherokee Nation as to the lands from time to time remaining unsold and unoccupied would give no right to the nation to settle its citizens thereon, until the privilege acquired by the United States to settle tribes of friendly Indians "*in any part of the country west of 96°*" should be satisfied, or in some authentic way be renounced; and this being so, no person attempting a settlement on these lands can justify under any authority given by the Cherokee Nation. On the contrary it is the duty as it is the interest of the Nation to prevent its citizens from making such settlement. It appears that Bell produced no evidence that such authority had been given him. But if he had, and the view above taken be correct, the United States, in the maintenance of their treaty privilege, would have been justified in ejecting him.

Customs Duties.

The parties to the treaty are jointly interested—the United States in using the lands for the purpose indicated, the Cherokees in obtaining payment for them.

I am, sir, very respectfully,

CHAS. DEVENS.

Hon. ALEXANDER RAMSEY,
Secretary of War.

CUSTOMS DUTIES.

The provision in section 2900 Rev. Stat., that the duty on imported merchandise "shall not * * * be assessed upon an amount less than the invoice or entered value," is applicable to entries under sections 9 and 10 of the act of June 22, 1874, chap. 391.

DEPARTMENT OF JUSTICE,
March 6, 1880.

SIR: In reply to yours of the 24th ultimo, asking whether the provision in section 2900 of the Revised Statutes, *that the duty on imported articles shall not be assessed upon an amount less than the invoiced or entered value*, applies to cases of entries under the ninth and tenth sections of the act of 1874, chap. 391, I have to say that in my opinion it does apply.

That provision, with slight alterations, is to be found in all laws upon the subject of entries of goods subject to ad valorem duties since the statute of 1846, chap. 74, which first made such duties general. (See *Kimball's case*, 10 Wall., 436.) The uniform policy, then, for more than thirty years has made the act of the importer, whereby he secures the delivery to himself of the goods so taxed, *conclusive* of their value *as against himself*. Under this state of the law, inasmuch as the words of the provision speak of the *entered value*, it seems the form of entry under the act of 1874 is protected, as well as the more usual form.

Arguments drawn from the policy of statutes *in pari materia* of course do not extend to include cases within statutory *penal provisions*, where the words of the latter do not accurately fit a case in question. There is therefore a material distinction between this case and that which you mention as having been the subject of my communication to

Remission of Forfeiture.

you of the 4th of October, 1878. Here the policy and the words also apply. There the words did not apply, so that there was no place for a consideration of the *policy*.

Very respectfully, your obedient servant,

CHAS. DEVENS,

The SECRETARY OF THE TREASURY.

REMISSION OF FORFEITURE.

Where a vessel was condemned and sold by decree of a United States court as a forfeiture under section 2874 Rev. Stat., for landing after sunset certain cases of foreign gin and brandy valued at more than \$400, the proceeds of the sale being still retained subject to the orders of the court: *Held* that the owner and a mortgagee of the vessel are persons who incurred the forfeiture within the meaning of sections 17 and 18 of the act of June 22, 1874, chap. 391, which authorize the Secretary of the Treasury, after certain proceedings had, to remit such forfeiture "if in his opinion the same shall have been incurred without willful negligence or any intention of fraud in *the person or persons incurring the forfeiture.*"

DEPARTMENT OF JUSTICE,

March 15, 1880.

SIR: Yours of the 31st of October, addressed to the Attorney-General, states the case of the British bark Viscount Canning, which has recently been sold under a decree for forfeiture by the United States district court for Southern Alabama, the proceeds of such sale being still held subject to the orders of the court.

The cause of forfeiture was the landing *after sunset*, &c., by said bark, at Darien, Ga., of certain cases of foreign gin and brandy, valued at more than \$400. (Rev. Stat., §§ 2872, 2874.)

In this connection you ask whether the owner and a mortgagee of the bark, assuming them to be innocent of any act of the officers thereof by which the forfeiture was incurred, can be considered as persons *who incurred* such forfeiture, within the meaning of sections 17 and 18 of the act of 1874, chap. 391 (18 Stat., 189), which empowers the Secretary of the Treasury, after certain proceedings, to remit such forfeiture "if in his opinion the same shall have been in-

Stoppage of Soldier's Pay.

curring without willful negligence or any intention of fraud in the person or persons incurring the same."

Upon consideration I answer your question in the affirmative.

Section 2872 (above referred to) forbids merchandise brought in vessels from foreign ports to be unladen or delivered from such vessels unless in *open day, i. e.*, between the rising and the setting of the sun, &c.

The next section imposes penalties upon the master of such vessel and every other person knowingly concerned or aiding in such unloading.

Section 2874 provides that in such case the merchandise so unladen, and if that be worth \$400, then the vessel, its tackle, &c., also, shall be subject to forfeiture.

It seems evident that the whole question relates to the situation at the time when the act causing the forfeiture occurred, and that the persons who at that time had specific interests in the vessel, &c., are those described in the above legislation as *incurring* the forfeiture. The master and other persons, unless also so interested, do not incur the forfeiture, and accordingly, by provisions in the immediate context (as above), they are described as persons "knowingly concerned, or aiding." They may, and generally do, *cause the forfeiture to be incurred*, but by *others, i. e.*, the owners and lien-holders.

It seems that the wording and apparent policy of the statute concur in extending the favor in question to such innocent parties as at the time of the commission of the act which occasions the forfeiture had specific beneficial interests in the vessel. It is only *their* concurrence in the acts or neglects in question that is to be considered and passed upon.

Very respectfully, your obedient servant,

CHAS. DEVENS.

The SECRETARY OF THE TREASURY.

STOPPAGE OF SOLDIER'S PAY.

The amount of the reward paid for the apprehension of a deserter, who upon trial by a court-martial for desertion has been convicted only of the offense of absence without leave, cannot lawfully be stopped against

Stoppage of Soldier's Pay.

his pay in a case where the sentence of the court does not impose such stoppage.

Under paragraph 160, Army Regulations, to warrant the stoppage there must be either a conviction of the offense of *desertion* or a restoration to duty without trial on conditions involving the stoppage. A conviction of the offense of *absence without leave* is not sufficient.

Stoppage of pay against a soldier is unauthorized unless made in execution of the sentence of a court-martial, or in pursuance of a statute, or in conformity to the Regulations of the Army, which have the force of law.

DEPARTMENT OF JUSTICE,*March 24, 1880.*

SIR: Your letter of the 25th ultimo presents for my consideration the following question: "Whether the amount (\$30) of a reward, paid for the apprehension of a soldier as a supposed deserter, can legally be stopped against his pay after he has been tried by court-martial for his offense and determined not to be guilty of desertion, but of absence without leave only?"

I assume that the case here contemplated is one wherein the court-martial has not by its sentence imposed stoppage of the amount out of the pay of the soldier as punishment for the offense (absence without leave) of which he was convicted, and that the inquiry is whether, assuming this to be so, the stoppage can be made by authority of law.

By the Army Regulations of 1863, which are now in force, a reward of \$30 is authorized to be paid "for the apprehension and delivery of a deserter," and the payment thereof is required to be promptly reported to the officer commanding the company in which the deserter is mustered, and also to the authority competent to order his trial (see paragraph 156, as amended by General Order No. 325, September 28, 1863). An appropriation is annually made "for the apprehension, securing, and delivery of deserters," which is placed under the control of the Quartermaster's Department, and out of which the reward is paid by a disbursing officer of that Department (see 20 Stat., 147).

The same regulations contain a provision having for its object the reimbursement of the Government, in certain contingencies, for expenditures thus made. It is found in paragraph 160, which reads: "Rewards and expenses paid for

Stoppage of Soldier's Pay.

apprehending a deserter will be set against his pay *when adjudged by a court-martial*, or when he is restored to duty without trial on such *condition*."

The provision for payment of a reward is limited to the case where a soldier is apprehended and delivered *as a deserter*; while the provision for reimbursement of the Government is applicable only to the case of a soldier who, having been apprehended as a deserter, is adjudged by a court-martial, or is restored to duty without trial on condition that the reward paid for his apprehension shall be stopped out of his pay. By the former provision it is not contemplated that payment of the reward is to depend upon the result of the trial of the soldier apprehended, *i. e.*, whether he is convicted or not. It is sufficient to authorize the payment that the soldier was apprehended and brought in on a charge of desertion. But under the latter provision, to warrant the amount of the reward paid for his apprehension to be set against the pay of the soldier, it seems to me that a conviction of *the offense of desertion* is necessary, or a restoration to duty without trial on conditions involving a stoppage of the amount of the reward from his pay, in which event the stoppage would be by the soldier's consent.

Where a trial takes place, and the soldier is acquitted, it is clear that, under paragraph 160, above cited, the amount of the reward cannot be stopped against his pay. The language of that provision, "when adjudged by a court-martial," must be deemed to mean when adjudged to be guilty, or convicted, by the court. If the soldier is convicted, not of *desertion*, but of *absence without leave*—which it is competent for a court-martial to do on a charge of desertion—a point here suggested is, whether the conviction is within the provision just referred to, so as to authorize a stoppage of the amount of the reward paid for his apprehension. On this point, as already intimated, I adopt the negative view, holding that a conviction, in order to come within that provision, must be of the offense of desertion. This conclusion is fairly deducible from the terms of paragraph 160, and of the paragraphs which precede and follow it under article XVIII, and also of paragraph 1358, Army Regulations, all of which appear to contemplate solely the case of *deserters*.

 Sale of Public Arms.

Stoppage of pay against a soldier is unauthorized, unless it is made in execution of the sentence of a court-martial, or in pursuance of a statute, or in conformity to the Regulations of the Army, which have the force of law. I find no statute which provides for stoppage of pay in the case of a soldier who has been absent without leave. However, in the Army Regulations, paragraph 1357, such provision appears. It authorizes stoppage of pay for the time during which the soldier was absent. This is the only provision in the law of the military service, of which I am aware, authorizing a stoppage of pay against a soldier on account of absence without leave, where stoppage of pay is not imposed as punishment for that offense by sentence of a court-martial.

To your inquiry I accordingly reply that the amount of the reward paid for the apprehension of a soldier as a deserter, who upon trial by a court-martial for desertion has been convicted only of the offense of absence without leave, cannot lawfully be stopped against his pay in a case where the sentence of the court does not impose such stoppage.

I am, sir, very respectfully,

CHAS. DEVENS.

Hon. ALEXANDER RAMSEY,
Secretary of War.

SALE OF PUBLIC ARMS.

The Secretary of War has no power to sell to a State serviceable arms belonging to the United States. These and other munitions of war are held by him for the public purposes of the Government, without any authority to dispose of them by sale.

DEPARTMENT OF JUSTICE,
 March 27, 1880.

SIR: Your note of the 23d instant transmits a telegram from the commanding officer of the Benicia Arsenal, San Francisco, communicating the desire of the State of California to purchase 500 rifles, and submits to me the question whether there is any authority of law for making such a sale, and if so, whether or not the proceeds could be used to replace the stores sold.

Prosecution of Claim against United States.

On carefully examining the statutes, I am of opinion that no such authority is vested in the Secretary of War, and that he holds the serviceable arms and other munitions of war for the public purposes of the United States, without any authority to dispose of them by sale. All the provision deemed necessary for the arming of the militia is made by the general laws which permit the distribution of arms to them, which are then held by the State in trust for the public purposes for which they are transmitted. (Sections 1661 and 1667, Rev. Stat.) I have found no legislation permitting any sale of arms to the States with the exception of the act of July 6, 1798, and the act of April 2, 1808. Both these acts were temporary in their character, were intended to meet an immediate want in some of the States where the people were destitute of arms and could not easily supply themselves therewith, and were both passed previous to the act of April 23, 1808, by which the first provision was made for the distribution of arms to the States for the purpose of arming the militia. The fact that Congress deemed it necessary to give special power to the President to sell arms to the States in the two early instances which I have mentioned is sufficiently indicative of its opinion that without such express authority the Executive could not thus dispose of the public property.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. ALEXANDER RAMSEY,

Secretary of War.

PROSECUTION OF CLAIM AGAINST UNITED STATES.

An officer of the Bureau of Military Justice cannot lawfully act as counsel for claimant in the Court of Claims, in the prosecution of the claim of another Army officer against the United States.

DEPARTMENT OF JUSTICE,

April 12, 1880.

SIR: Referring to your letter of the 8th instant, I am of opinion that the section 5498, Revised Statutes, would prevent any officer of the Bureau of Military Justice, or other official of the War Department, except the party interested,

Soil under Navigable Waters.

from prosecuting the claim of Maj. A. K. Arnold against the United States. The express words of that section clearly cover the case. It will be observed that it is a matter in which the Department of War, as such, has no interest, although it may concern the interests of individual officers. Referring to section 1063, it will also be observed that the case must be prosecuted in the Court of Claims as if "originally commenced by the voluntary action of the claimant." If the express words of the statute needed any re-enforcement, it would readily be found in the extraordinary position in which the claim would be presented to the court in case the War Department and the Department of Justice, through their subordinate officers, should be involved in a controversy as to the action of another Department, namely, the Treasury. Such a state of things obviously could not exist. All the Departments are simply representative of the Executive.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. ALEXANDER RAMSEY,
Secretary of War.

SOIL UNDER NAVIGABLE WATERS.

The property of an individual in a bar or other part of the bed of a navigable river is subject to the public right of navigation, and to the right of the public to regulate, control, and divert the flow of the water therein in the interests of navigation; and where the stream is a navigable river of the United States, the right thus to regulate, control, and divert the flow of water belongs to Congress. Damage resulting to the individual proprietor from the exercise of that right is not a proper subject of compensation.

Accordingly, where it was proposed to construct a dike in the Ohio River to improve its navigation (under an appropriation by Congress for the improvement of that river), extending from the shore on the south side of the river into the middle of the stream, crossing a sand bar at the outer extremity, which is under water at all times except when the river is at its low-water level or within a few feet thereof: *Advised* that the United States would incur no liability to the owner of the sand bar by reason of any washing away of the same, or other damage thereto resulting from the construction of the dike; that the

Soil under Navigable Waters.

right of the United States thus to occupy the bar for the improvement of navigation is paramount to the right of the owner, and must prevail over the claims of the latter.

DEPARTMENT OF JUSTICE,
April 27, 1880.

SIR: By your letter of the 6th instant and the accompanying papers it appears that for the purpose of improving the navigation of the Ohio River at Portland, Ky. (under a recent appropriation made by Congress), it is proposed to construct a dike extending from the shore on the south side of the river into the middle of the stream, crossing a sand bar at the outer extremity. This bar, which is under water at all times except when the river is at its low-water level or within a few feet thereof, is claimed by an individual as his property, and the claimant has notified the engineer officer in charge of the work that he will "hold the United States responsible" for any washing away of the bar by reason of the dike.

At the suggestion of the Chief of Engineers, you submit for my consideration the question "whether the rights of the United States to occupy a sand bar in the river for the purpose of improving its general navigation should be subordinate to claims of this nature from individuals."

This question regards the rights of an individual proprietor to a part of the *bed* of a navigable river of the United States on the one hand, and on the other the rights of the United States touching the improvement of the navigation of such river.

It is well settled that under the authority given by the Constitution to regulate commerce among the several States Congress has the right to regulate navigation, and to that end has power to make improvements in the beds of navigable rivers of the United States, to divert the water from one channel to another, and to plant or remove obstructions therein at its will. (*South Carolina v. Georgia et al.*, 93 U. S., 4.) Damages resulting to individuals from works of this kind are not proper subjects of compensation, the damage in such cases being regarded as *damnum absque injuria*. The title of the individual proprietor to a bar or other part of the bed of a navigable river is subject to the public right of navigation,

Missouri River, Fort Scott and Gulf Railroad Company.

and to the right of the public to regulate, control, and divert the flow of the water therein in the interests of navigation. As I have already intimated, where the river is a navigable river of the United States, the right thus to regulate, control, and divert the flow of the water belongs to Congress.

From these principles it follows that the United States would incur no liability to the owner of the sand bar across which the proposed dike is to extend by reason of any washing away of the bar, or other damage resulting from the construction of the dike.

In direct answer to your inquiry, then, I have the honor to state that in my opinion the rights of the United States to occupy a sand bar in a navigable river for the purpose of improving its navigation are not subordinate to the rights of individuals therein, but, on the contrary, must prevail against the claims of individual proprietors.

I am, sir, very respectfully, your obedient servant,
CHAS. DEVENS.

Hon. ALEXANDER RAMSEY,
Secretary of War.

MISSOURI RIVER, FORT SCOTT AND GULF RAILROAD COMPANY.

The act of July 25, 1866, chap. 241, sections 1 to 5, the act of July 12 1876, chap. 179, section 13, and the act of March 3, 1877, chap. 125, considered; and *held* that upon the acceptance by the Missouri River, Fort Scott and Gulf Railroad Company (formerly the Kansas and Neosho Valley Railroad Company) of the terms and conditions of the said act of March 3, 1877, according to the provisions thereof, that act became binding upon the company from its date, and that the road of the company should be treated as a non-land-grant road from such date (March 3, 1877).

DEPARTMENT OF JUSTICE,
April 28, 1880.

SIR: You have requested me to advise you as to the date from and after which the Missouri River, Fort Scott and Gulf Railroad should be treated as a non-land-grant road.

I will briefly summarize the provisions of various acts of Congress which will indicate how the Post-Office Department

Missouri River, Fort Scott and Gulf Railroad Company.

has an interest in the determination of the question submitted.

The act of July 25, 1866 (14 Stat., 237), granted lands to the railroad in question on condition (section 5) *inter alia* that the mails should be carried at such rates as Congress might direct. Section 13 of the act of July 12, 1876 (19 Stat., 78), provides that railroads constructed by land-grants made by Congress on such a condition as is above recited should receive only eighty per centum of authorized compensation.

The act of March 3, 1877 (19 Stat., 404), provides for a repeal of the first five sections of the act of July 25, 1866, and for the acceptance within ninety days of the terms of the repealing act by the company.

I am of the opinion that section 1 of the act of March 3, 1877, in view of the provisions of the remaining sections, was not an unconditional or absolute repeal of certain sections of the act of 1866, inasmuch as a failure to accept the terms and conditions of the act of 1877 by the company would have rendered nugatory the whole act.

Although the repealing act was evidently passed with the consent, and most likely at the instance of the company, it was possible for the company to refuse to comply with its terms, conditions, and requirements.

The recognition by this statute of the company's title in and right to the lands manifested by sections 3, 4, and 5, notwithstanding the previous repeal of the sections of the act of 1866, which donated lands, &c., shows that it was not the purpose of Congress to deprive the company of its vested rights without its consent. In effect, the repealing act treated the consent of the company as essential to its validity, and was an offer on the part of Congress of change in the original agreement to the other party in interest.

When the company accepted the terms and conditions of the act within the time prescribed, and thereby assented to the new arrangement, the act became operative, and, like other acts of Congress, should be considered as binding from its date, March 3, 1877. In other words, the acceptance by the company related back to the day when the act was approved by the President.

Missouri River, Fort Scott and Gulf Railroad Company.

The ninety days was reasonable time allowed the company to ratify the act and accept its terms. The date of its passage was a part of the act, and the acceptance was as of that date by the well-known legal principle of relation.

This construction is fortified by the language of the first clause of section 4 of the act: "That said railroad company, its successor or assigns, shall reconvey, by deed or deeds duly executed, all unsold lands patented to it, in pursuance of the sections hereby repealed, and shall pay into the Treasury of the United States the proceeds of all such lands sold and conveyed prior to the passage of this act."

The words "prior to the passage of this act" distinctly prevented the company from disposing of lands after the passage of the act. The company therefore could not convey title to any land after March 3, 1877, if the act was accepted. If it could convey no title after the passage of the act, it ceased as of that date to be a land-grant road.

If, however, there remained title to any lands in the company between the date of the act and that of the acceptance, which would be the case if the act did not take effect until the acceptance, it is reasonable to believe the act would have provided for a reconveyance of all lands held by the company prior to the acceptance, instead of prior to the passage of the act.

It certainly never could have been the intention of Congress to give the company the opportunity to have lands patented after the passage of the act, and to sell the same without accountability to the United States, which it could have done if the act did not become operative until May 23, 1877, the date of acceptance.

In direct answer to your inquiry, I am of opinion that the Missouri River, Fort Scott and Gulf Railroad should be treated as a non-land grant road from the date of the act of March 3, 1877.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. DAVID M. KEY,

Postmaster-General.

Claim against Mail Contractor—Compromise.

CLAIM AGAINST MAIL CONTRACTOR—COMPROMISE.

Where it appeared that a mail contractor was of unsound mind when he executed contracts for carrying the mail over certain routes, and also when he signed the bond of another person who was nominally contractor for carrying the mail over another route, but the real party in interest was the contractor first mentioned; and, by the failure to carry out each of the contracts, damages accrued to the United States: *Held* that, in order to the exercise of the discretionary power conferred by section 409 Rev. Stat. upon the Postmaster-General to compromise, release, or discharge claims in behalf of the Government arising under the postal laws, the "fact" to be ascertained in the case is not the mental condition of the mail contractor, but whether the interests of the Post-Office Department require the exercise of such power.

DEPARTMENT OF JUSTICE,

May 1, 1880.

SIR: From the papers transmitted with yours of the 23d ultimo, it appears to be conceded that Charles C. Huntley was of unsound mind when he executed five contracts for carrying the mail and signed the bond of William H. Williams, nominally the contractor over another route, the real interest in this also being in Huntley. You ask me whether the facts disclosed make it your duty to exercise favorably the discretion vested in you by Rev. Stat., section 409, damages having accrued by the failure to carry out each of the above-named postal contracts.

That section authorizes you to prescribe general rules, &c., "for the government of the Sixth Auditor, in ascertaining the *fact* in each case in which the Auditor shall certify to him [the Postmaster-General] that *the interests of the Department* PROBABLY require the exercise of his powers over fines, penalties, forfeitures and liabilities; and upon *the fact* being ascertained, the Auditor may, with the written consent of the Postmaster-General, mitigate or remit such fine," &c., "or compromise," &c., "such claim," &c.

Some doubt arises respecting the meaning of your inquiry as to your duty "to exercise *favorably*" the discretion vested in you by that section. From the accompanying papers, including the Auditor's certificate, it would seem as though the fact of Mr. Huntley's unfortunate condition was supposed to be the thing to be ascertained. I do not so understand the

Claim against Mail Contractor—Compromise.

law. I concur in the opinion expressed by the Assistant Attorney-General attached to your Department, that the fact to be ascertained is that *the interests of the Department* require the exercise of your power given in that section. The Auditor certifies, first, that "*probably*" such is the case; thereupon you will direct him how to proceed to make the thing certain; if the fact is thus ascertained actually to be as first thought probable, the Postmaster-General may, in writing, consent to a remission of a fine or forfeiture, and to the compromise or release of damages for such sum, and on such terms as the Auditor deems just and reasonable. Thus, it will be seen, the question does not arise whether or not any contractor is entitled to the exercise of "favorable" discretion, but always what is for the interest of the Department.

In the present case it does not appear that the Auditor has proceeded, under prescribed regulations and methods of procedure, to ascertain whether or not *the interests of the Department* require the exercise by you of the power conferred by section 409, if, indeed, he has ever certified to you that such is "*probably*" the case. The occasion for the exercise of your power to grant or withhold consent to a compromise has not yet arisen; when it does you can consider whether in the interests of your Department Mr. Williams is entitled to any consideration, he having executed a contract colorably in evasion of the provisions of Revised Statutes, section 3963, and having as good opportunity to judge of Mr. Huntley's capabilities as the postal officials had; the result of Mr. Williams's course being, that upon his failure to carry out the contract, the five next higher bidders declined to accept it upon the bids originally made by them.

It may, perhaps, properly be noticed that this is not the case of a forfeiture which may be remitted, but of a claim for damages to be compromised or discharged, under section 409, upon the payment of *some* sum of money, upon just terms.

The papers which accompanied your letter are herewith returned.

Very respectfully, your obedient servant,

CHAS. DEVENS,

HON. DAVID M. KEY,
Postmaster-General.

River Frontage at Mouth of Grand River, Ohio.

FREE LIST.

Photographic slides, for use in a magic lantern, imported for an institution of learning, and designed solely for the instruction of its students, are entitled to free entry. Such importation is exempt from duty by either of two provisions, viz, section 2505 Rev. Stat., exempting "philosophical and scientific apparatus, instruments," &c., and the act of June 6, 1878, chap. 136.

DEPARTMENT OF JUSTICE,

May 1, 1880.

SIR: Yours of 22d ultimo inquires whether or not certain photographic slides, for use in a magic lantern, imported by the professors of Harvard College, in behalf of that institution, and by me understood to be its property, designed solely for the instruction of its students, are entitled to free entry, or were properly assessed by the collector at 40 per cent. ad valorem as manufactures of glass.

I think, under the special circumstances of this case, they were entitled to free entry, either of the provisions mentioned by you, viz, Revised Statutes, section 2505, exempting philosophical or scientific apparatus specially imported for the use of an institution incorporated for educational purposes, or the act of June 6, 1878 (20 Stat., 99) admitting free photographs for like purposes, being apt and sufficient to exempt this importation.

Very respectfully, yours,

CHAS. DEVENS.

Hon. JOHN SHERMAN,

Secretary of the Treasury.

RIVER FRONTAGE AT MOUTH OF GRAND RIVER, OHIO.

Where certain parties, claiming the land formed by accretion along the line of the piers erected by the United States at the mouth of Grand River, Ohio, proposed to sell the same with the river frontage bordering thereon for railroad purposes—the design of the party proposing to purchase being to build on the premises substantial docks upon such lines as the Government shall indicate: *Advised* that such river frontage is affected by the rights of the United States only so far as the navigation of the river and the maintenance of works constructed for the improvement thereof are concerned; that those rights do not preclude

River Frontage at Mouth of Grand River, Ohio.

the owner from making any use of his property which does not obstruct the one or interfere with the other of these objects; and that the intended use of the river frontage by the purchaser (in view of the report of the engineer officer in charge) would not conflict with any right of the United States in the premises.

DEPARTMENT OF JUSTICE,

May 10, 1880.

SIR: I have considered the case and question submitted by your letter of the 8th ultimo, relative to the river frontage at the mouth of Grand River, Ohio.

It appears that about the year 1826, by authority of Congress, the work of improving the mouth of that river was begun, and that piers have since been constructed on each side of the river at its junction with the lake, extending from a point a short distance inside of what was in 1826 the shore line of the lake out into the lake. The lake shore has in the mean time advanced by accretion, on both sides of the river mouth; the distance advanced on the west pier side being 1,450 feet, and that on the east pier side 750 feet.

Certain parties claiming ownership of the land formed by accretion between what was originally the lake-shore end of the west pier and a point distant therefrom on the river front about 350 feet in the direction of the lake, propose to sell this land with the river frontage bordering thereon for railroad purposes—the intention of the purchaser being to construct substantial docks upon such lines as the General Government shall indicate.

The inquiry is whether in selling the land these parties convey the river frontage between the points mentioned.

Assuming the fee of the premises to be in the proposed vendors, a conveyance of their title would pass to the vendee the river frontage, subject to the rights of the United States. These rights affect the property in question (the river frontage) only so far as the navigation of the river and the maintenance of works constructed for the improvement thereof are concerned. They do not preclude the owner from making any use of his property which does not obstruct the one nor interfere with the other of those objects.

I observe that the engineer officer in charge, Major Wilson, in his letter to the Chief of Engineers of March 31, 1880, refer-

Disbarring Attorneys Practicing in Departments.

ring to the river frontage proposed to be sold, states that "what remains of the old work on this section is decayed and in a state of complete dilapidation; it has fulfilled the purpose for which it was constructed, and it is probable that the General Government will never rebuild it unless as a simple revetment. * * * It seems to me that it would be advantageous to have the old work, upon which the Government desires to expend no more money, in the hands of parties who will erect substantial docks upon it."

Agreeably to this view, the intended use of the river frontage by the purchaser—the erection thereon of substantial docks on lines to be indicated by the Government—would not conflict with any right of the United States in the premises.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. ALEXANDER RAMSEY,
Secretary of War.

DISBARRING ATTORNEYS PRACTICING IN DEPARTMENTS.

The head of a Department has authority to disbar (i. e., decline to recognize or to transact business with) attorneys practicing therein for misconduct. Opinion of Attorney-General Hoar on same subject, in 13 Opin., 150, approved.

DEPARTMENT OF JUSTICE,
May 13, 1880.

SIR: Referring to your informal note of the 21st of April, I would answer that the Secretary of the Interior has authority to disbar for misconduct attorneys practicing before his Department. This authority is not given by statute, but seems to have been one exercised heretofore by heads of Departments for the protection of the Government. Its limits were defined by Attorney-General Hoar as follows:

"It is competent to the head of a Department, as a measure for the protection of the public interests committed to his charge, to decline to recognize or to suspend the transaction of business with an agent or attorney for frauds and fraudulent practices attempted or committed by him in the prosecution of claims before the Department, and whose character is

 War Claim of Pennsylvania.

such that a reasonable degree of confidence cannot be placed in his integrity and honesty in dealing with the Government.

"The authority to pursue this course under those circumstances rests upon the very necessity that exists for its adoption as a safeguard against fraud in administering the laws relating to the settlement and payment of claims upon the United States.

"Besides, it is a just and necessary limitation upon the right of a party to be represented by an agent, and to select the agent by whom he will be represented, that he shall not employ a person offensive or dangerous to the other party with whom he is to deal."

Whether the facts are such as to bring the case within the legal principle thus announced must be decided by the head of the Department in which the claim agent practices.

Very respectfully, your obedient servant,

CHAS. DEVENS.

The PRESIDENT.

 WAR CLAIM OF PENNSYLVANIA.

Upon consideration of the facts set forth in the opinion: *Held* that the settlement of the claim of the State of Pennsylvania for reimbursement of funds expended for payment of militia in the service of the United States, authorized by the act of April 12, 1866, chap. 40, was a matter intrusted by that act to the Secretary of War, and that the award which was made by the Secretary in favor of the State on June 16, 1866, must be treated as *res adjudicata* and binding upon his successors. But *held, further*, that if an error appear in the settlement which is merely clerical in its character, or which involves a matter of computation only, the Secretary of War may now reopen the same to the extent of rectifying such error, but no further.

DEPARTMENT OF JUSTICE,

May 18, 1880.

SIR: Your letter of the 4th of March last transmits a claim of the State of Pennsylvania, and a record of facts embracing certain questions of law, on which you ask my opinion.

The facts may be condensed to the following:

In June, 1863, the governor of Pennsylvania called the militia into State service to repel an actual invasion. (Cong. Globe, part 2, first session Thirty-ninth Congress, p. 1553.)

War Claim of Pennsylvania.

These troops were never mustered into the service of the United States, and no law or appropriation then existed authorizing the payment of troops under such circumstances, even though they rendered valuable services.

The governor was advised by the President and Secretary of War that a recommendation would be made to Congress at its next session to make an appropriation for the payment of such troops, including those of the State of Pennsylvania; and, further, that if he could raise the necessary amount to pay the forces the appropriation would be applied to refund the advance to those who made it.

On January 4, 1864, the Second Auditor of the Treasury wrote to the Secretary of War as follows:

"Respecting the claim of the State of Pennsylvania, amounting to \$671,476.43, for payments made to the militia called out under the proclamation of the governor of that State dated June 26, 1863, I have the honor to state that the rolls and vouchers for said payments have been administratively examined in this office and found in the main correct. Errors and discrepancies amounting to say \$2,900 have been discovered, consisting principally of cases where the internal revenue tax is not deducted, or when deducted not accounted for."

On the same date, the Secretary of War communicated to the Hon. Thaddeus Stevens, chairman of the Committee on Ways and Means, the facts stated by the Auditor, and added: "There being no appropriation out of which these payments could be made at the time they were required, patriotic citizens of Philadelphia advanced the money, and it is proper that they should be reimbursed without delay. I would respectfully recommend, therefore, that an immediate appropriation for that purpose be made."

In pursuance of this recommendation, a bill passed the House of Representatives May 5, 1864, appropriating \$700,000 to reimburse the advances, but this bill failed between the two Houses of Congress.

On August 24, 1864, an act was passed by the Legislative Assembly of Pennsylvania which authorized the State to reimburse the citizens who had advanced the money in September, in 1863, and the State authorities, it is alleged, paid

 War Claim of Pennsylvania.

the sum total advanced, together with interest and expenses, amounting to \$713,419.61.

On February 3, 1865, the Assembly of the State passed a joint resolution requesting the President and the Congress of the United States to take the necessary steps to pay the indebtedness of the United States to the Commonwealth on this account, the preamble to the resolution stating the sum to be \$713,000 with interest. (State Laws, 1865, p. 861.)

On the 21st of March, 1866, a bill was introduced in Congress to reimburse the State, which became a law, and is as follows:

“AN ACT to reimburse the State of Pennsylvania for moneys advanced Government for war purposes.

“That to supply a deficiency in paying the Army, under the act of March fourteenth, eighteen hundred and sixty-four, and to reimburse the State of Pennsylvania for money expended for payment of militia in the service of the United States, the sum of eight hundred thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated: *Provided*, That before the same is paid, the claim of the said State shall be again examined and settled by the Secretary of War” (14 Stat., 32).

In accordance with the above proviso, the vouchers and pay-rolls were examined by the Paymaster-General and Provost-Marshal-General, and a report made to the Secretary of War by the latter officer, as follows:

* * * * * *	
Amount claimed by the State	\$671, 480 09
Revenue tax withheld	3, 741 66
Found due the State	670, 806 85
Revenue tax	3, 732 50
* * * * * *	

Thereupon the Secretary of War issued his requisition, No. 4195, June 16, 1866, for \$667,074.35, in favor of the State of Pennsylvania, payable to Hon. Andrew G. Curtin, present, due said State on settlement approved by the Secretary of War. (See Second Auditor's verifications of May 24, 1879.) On the 20th of June, 1866, the State received this sum.

War Claim of Pennsylvania.

Upon these facts the agent of the State now claims that this payment was not based on the account presented by the State, for the payment of which the sum of \$800,000 had been appropriated by the act of April 12, 1866, but on the account that had been forwarded by the Rogers Committee in 1863 to the War Department. But it appears that the examination of vouchers made by the Second Auditor was of those forwarded by the Rogers Committee and was made at the request of the Adjutant-General of the State of Pennsylvania; and it is quite clear that Congress dealt with the claim of the State as one which was based solely upon the account of that committee of advances made to it by them.

The first and second of your inquiries are as follows :

"1. Can this case be reopened for consideration of the claim now submitted ?

"2. What effect is to be given to the award made June 16, 1866 ?"

I understand the claim to be for interest which the State had paid to the committee upon the advances made by them for the actual payment of the troops, and that the amount of that claim is something over \$40,000.

It is a general principle (which has been so often recognized in the opinions of the Attorneys-General that I do not think it necessary to cite any authorities to sustain the position) that when an executive department has once passed upon and finally disposed of a claim before it, it is to be treated as *res adjudicata*. That this matter was adjudicated by the then Secretary of War, and that his award of June 16, 1866, was such an adjudication, do not seem to me to admit of question.

The only suggestion that would seem to me to require notice in this connection is that the Secretary of War was not by the act the person entitled to examine and decide as to the amount of the claim. If such were the case, then the adjudication would be *coram non judice*. But an examination of the statute shows satisfactorily that it was a matter intrusted to the Secretary of War. The general current of the law undoubtedly gives to the Treasury Department the settlement of all disputed money claims, but it is entirely competent for Congress to alter this arrangement, and it has repeatedly done so. In reference to the present case, it will be observed that

War Claim of Pennsylvania.

when the law which we are construing was passed there had already been an examination of this claim in the Treasury Department. When, therefore, by a statute Congress in express terms provides that before the claim of the State shall be paid it shall be "examined and settled by the Secretary of War," the obvious construction is that in the case referred to the decision of that Secretary was to be the final adjudication. Such was the action of the then Secretary, and it was apparently acquiesced in by the governor of the State who had received the warrant on behalf of the same as being due to it "on settlement approved by the Secretary of War."

I am therefore of opinion that the case cannot be now reopened for consideration of the claim submitted, and that, administratively, the award is to be considered as final.

I ought, however, in connection with the principle to which I have adverted, that a final adjudication by the head of a Department is binding upon his successors, to add that where an error is one merely clerical in its character, or involving a matter of computation only, it has been held repeatedly that the adjudication may be altered to the extent of rectifying such error, but no further.

An examination of the facts in this case shows that an error of this latter description was made in the adjudication. It appears by the report of the Second Auditor of the date of May 24, 1879, that :

"On referring to the vouchers filed in this office it is found that the items which make up the amount of \$670,806.85, found due the State, are *net* items, the internal-revenue tax having been deducted on each taxable voucher, and the net amount only carried to the abstract. The State of Pennsylvania was therefore entitled to \$670,806.85 instead of \$667,074.35, and the difference, namely, \$3,732.50, is still due the State."

To this extent, namely, for the purpose of correcting the error of computation, and thus of awarding to the State the sum of \$3,732.50, it is, in my opinion, competent for the Secretary of War to reopen the adjudication.

The third and fourth of your inquiries do not now arise, in view of the fact that in my opinion the award cannot be reopened except to the extent just stated. It would not there-

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were be advisable to consider what might be the decision were they properly before me.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. ALEXANDER RAMSEY,

Secretary of War.

NAVY REGULATIONS—SETTLEMENT OF NAVAL ACCOUNTS.

The regulations of the Navy concerning payments to administrators of balances due deceased seamen and marines, payments of arrearages claimed under wills, the wills of persons in actual service and the attestation of the same, &c., are not applicable to or binding upon the accounting officers of the Treasury Department in the settlement of naval accounts. They extend to and govern only those persons who are in the naval service.

Paragraphs 9, 12, and 13 of the Navy Regulations of 1876 (page 114) commented on and construed.

DEPARTMENT OF JUSTICE,

May 21, 1880.

SIR: Your letter of April 9 last submits to me the following question:

“Are the Navy Regulations (paragraphs 9, 12, and 13, page 114 of the edition of the Regulations of 1876) on the subject of payments to administrators, and under wills, applicable to and binding upon the accounting officers of the Treasury Department in the settlement of naval accounts?”

You inclose a communication from the Fourth Auditor and a copy of a decision of the Second Comptroller upon the subject.

In regard to the question proposed, it is evident that the fundamental inquiry is whether or not the Navy Regulations have the force of law in the larger sense, or whether they have only the force of law so far as to bind those who are subject to them.

Section 1547 Revised Statutes provides that the regulations “issued by the Secretary of the Navy prior to July 14, 1862, with such alterations as he may since have adopted, with the approval of the President, shall be recognized as the regulations of the Navy, subject to alterations adopted in the same manner.”

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The regulations as they at present exist are those of 1876, and the Secretary of the Navy, in adopting them, says they are "established with the approval of the President of the United States for the government of all persons attached to the naval service"; and in adopting certain supplementary regulations of the date of November 1, 1878, you have declared them to be "published for the government of commanding, pay, and all other officers of the Navy."

It seems to me that these two statements accurately indicate the objects and the limits of the naval regulations, which are for the government of the persons attached to the naval service in the conduct of their several duties, and the violation of which would subject such persons to official rebuke. It would be going too far to hold that because the Secretary of the Navy, with the approval of the President, has a *quasi* legislative power in prescribing the mode in which the subordinates of the Naval Department should perform their duties, and the rules by which they should be governed, he could also prescribe a rule which would control the action of the accounting officers upon the same subject.

There has been a constant care on the part of the Navy Department to protect the effects of its deceased officers and seamen from anything like spoliation. In the regulations of 1818, the disposition of the effects of one who had deceased is provided for, and the amount received is to be carried to the credit of the deceased for the benefit of his legal representatives. The same regulations provide: "No purser shall pay over any balance of wages to an administrator or executor, without first obtaining an order from the Secretary of the Navy."

The regulations of 1832 (commonly known as the "red-book") provide: "No payment of balances due deceased persons will be made but to heirs who are also administrators; to administrators with the consent of the heirs; or to creditors to the amount of their claims. Sailors and marines of the United States are paid without reference to any regulations of State laws or tribunals."

It must be deemed that the rules thus prescribed are for the government of those persons in the Navy whom they may immediately affect. They cannot limit or alter the

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rights of others who are not amenable to them. In the regulations for the Army as they existed in 1825 (Art. 71, sections 11 and 12) it is declared that "paymasters are not authorized to settle with the heirs or administrators of deceased officers or soldiers"; and the reason therefor is given by the supplementary words of the regulation—"it being properly the duty of the accounting officers of the Treasury Department."

The character of all the regulations in question indicates that they were not intended to affect any persons except those subject to the orders of the Secretary of the Navy. Unless they are thus construed, it would seem that a power to legislate was assumed independently of the Federal and State laws. For the purpose of protecting the rights of the heirs and relatives of deceased seamen, the regulations of the Navy may well require that if the disbursing officer pays the money to an administrator he shall establish facts additional to those which he would ordinarily be required to do.

To examine the regulations immediately inquired of.

The ninth regulation provides:

"Payment of balances due deceased seamen and marines will be made to administrators who are heirs, or appointed with the consent of a majority of the heirs."

If this were to be construed as meaning that no other payment should be made than to such administrator as therein described, important rights would be altered and changed. Its proper construction is that the paymaster is only authorized to pay the administrator under the circumstances stated in the regulation.

The twelfth regulation, in its first clause, provides only that where there are minor heirs guardians should be appointed. It then goes on to provide: "Payment of arrearages, claimed under a will, will only be made after satisfactory proof of the will is adduced to the accounting officers." But this must be interpreted as a direction to disbursing officers of the Navy not to pay to an executor under a will until the accounting officers have been satisfied of the existence of the will.

The thirteenth regulation is as follows:

"Wills of persons in actual service must in all cases, when

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possible, be in writing, and attested by an officer. A nuncupative will must be reduced to writing immediately, and be attested by at least two officers. The executor will be required to produce the original will, or a copy duly authenticated. Arrears found to be due shall be paid in all cases to the proper parties interested in preference to attorneys."

It will be seen that this regulation contains certain proper provisions for accuracy in wills, for the establishment of nuncupative wills, and their attestation, &c.; but all of them contemplate that they are to be observed by those only to whom the regulations apply. There is nothing to suggest any intention to alter the general law upon the subjects to which the regulation relates.

While in general terms it is often said that the Army and Navy regulations have the force and effect of law, this can only be properly so where we are dealing with a person or subject-matter over which the Secretary has official control. In *Gratiot v. United States* (4 How., 117) there is an expression similar to that I have suggested, used by Mr. Justice Wayne; but he is dealing with the case of General Gratiot, an officer clearly subject to the Army regulations. Nor do I understand that it can be said that the fact that Congress has adopted the regulations gives them the force of law in the general sense. It gives them the force of law only so far as they assume to control those to whom the regulations were applicable. Were it otherwise, it would be necessary to hold that inasmuch as the Secretary, with the authority of the President, has a right to alter these regulations, Congress has parted with its legislative power so far as the Navy is concerned and has conferred it upon the Secretary of the Navy. That which it has conferred upon the Secretary of the Navy is not any portion of its general power of legislation, but only the right to make appropriate regulations for the performance of their duties by those whom Congress has placed under his official control.

Among the authorities cited in Mr. Beardsley's letter (which I have read with care) is an opinion of Attorney-General Berrien (2 Opin., 209). I find certain expressions in that opinion which would seem to militate against the view I have suggested. The claim was as follows: William Tharp, who had

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been a sutler in the Army, and an administrator of the estates of certain deceased soldiers, procured a law to be passed by which the accounting officers were authorized to settle with him upon the same principles of equity and justice which were extended to sutlers under the then existing Army regulations, with a proviso "that no larger sums shall, in any case, be awarded to said Tharp, on account of his claims against a deceased or deserted soldier, either as principal or interest, than appears from the muster and pay rolls to have been actually and justly due to such non-commissioned officer and soldier from the United States." Tharp sought to obtain the benefit of this law, and he further sought, by virtue of the fact that he was administrator of certain deceased soldiers, to obtain sums larger than were due him as their creditor. The only point actually decided by Attorney-General Berrien was that Tharp was entitled, under the statutes as they then stood, to be settled with, not as administrator, but as creditor of the deceased soldier, and to have his accounts examined by the accounting officers of the Treasury, and to be paid the amounts respectively ascertained to be due, if the balance due the soldier in each case should be adequate.

There is no occasion to question this decision; but it is undoubtedly true that Attorney-General Berrien uses some language in the course of it from which it may be inferred that his impression was that the rights of the administrator were controlled by the regulations of the Army. But it will be observed that his attention was not called to the inquiry whether the regulations could affect persons who were not in the Army, and who were either officers of Departments other than that which passed the regulations or were citizens simply. The question, therefore, that we have here discussed was obviously not presented to his mind nor passed upon by him.

In direct answer to your inquiry, I am of opinion that the Navy regulations on the subject of payments to administrators and under wills are to be construed as binding only upon the officers and seamen of the Navy, that they are not applicable to nor binding upon the accounting officers of the Treasury Department in the settlement of naval accounts,

Detail of Army Officer for Civil Duty.

and that it was not intended that they should control those officers.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. R. W. THOMPSON,
Secretary of the Navy.

DETAIL OF ARMY OFFICER FOR CIVIL DUTY.

Section 1222 Rev. Stat. does not forbid the detail by the Secretary of War of an officer of the Army on the active list for duty on the Geological Survey, under the Interior Department.

But such detail would come within the prohibition of section 1224 Rev. Stat., should it require the officer to be separated from his company, regiment, or corps, or should it otherwise interfere with the performance of his military duties proper.

DEPARTMENT OF JUSTICE,

May 21, 1880.

SIR: Your letter of the 17th instant requests my opinion upon the following question:

"Do the restrictive provisions of sections 1222 and 1224 Revised Statutes operate to prevent the detail of an officer of the Army on the active list to duty with Professor Clarence King, in the United States Geological Survey, under the Department of the Interior, or is there any other legal impediment to such a detail?"

Section 1222 is as follows:

"No officer of the Army on the active list shall hold any civil office, whether by election or appointment, and every such officer who accepts or exercises the functions of a civil office shall thereby cease to be an officer of the Army, and his commission shall be thereby vacated."

A detail such as is proposed would not be the holding of a civil office by election or appointment, and while the service to which the officer might be assigned would be civil and lie within the sphere of a civil office, if it were performed under the authority and in obedience to the orders of his military superior, and not as a duty which it was incumbent upon him to perform by reason of any relation to or connection with the office, it could not be said that in thus performing the service

Detail of Army Officer for Civil Duty.

he was exercising the functions of such civil office. I do not find, therefore, that there is any restriction in the provisions of this section to the detail by you of a military officer for duty with the Interior Department in the geological survey adverted to.

More difficulty arises in considering section 1224. As it now stands it is as follows:

"No officer of the Army shall be employed on civil works or internal improvements, or be allowed to engage in the service of any incorporated company, or be employed as acting paymaster or disbursing agent of the Indian Department, if such extra employment requires that he shall be separated from his company, regiment, or corps, or if it shall otherwise interfere with the performance of the military duties proper."

This section is a restatement with verbal alterations of the act of July 5, 1838, chap. 162, sec. 31 (5 Stat., 260). An examination of the official reports at the time of the passage of said act indicates quite clearly that the motive of Congress in passing it was to attempt to remedy the evil that had arisen from the fact that many officers had been detailed for duty to various civil duties upon works of internal improvement, some of which were conducted by the United States, others by individual States, and others by incorporated companies, and that the result had been that the companies and regiments had become much depleted in their complement of line officers. It is therefore an important consideration, in determining whether the proposed detail can be made, to ascertain whether the work contemplated is a civil work.

Upon an examination of the statute providing for the geographical and geological survey now under the direction of Professor King, it seems to me clearly a civil work. No military reasons appear for such survey, none are assigned, nor, so far as I can ascertain from the statute, are any military objects contemplated by it. Undoubtedly, it is true that a general geographical survey must always have great military value; but I am of opinion that the survey in question is a civil work. In this view, it seems to me that an officer cannot be detailed to aid in the performance of such work if its effect is to be that he is separated from his company, regiment, or corps. Of course there may be a strictly military

Official Correspondence—Penalty-Envelope.

duty connected with a civil survey—such as having charge of its escort—but your question contemplates apparently that the officer is not to be detailed for such duty. There are certain statutes empowering officers of the Army to be detailed to particular civil duties, such as Indian agents, instructors in colleges, &c., which I have not thought it necessary to advert to in this opinion, as such special statutes must be considered as exceptions to the general rule, which does not permit the officer to be separated from his company, regiment, or corps for civil work, employment on internal improvements, service in incorporated companies, &c.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. ALEXANDER RAMSEY,
Secretary of War.

OFFICIAL CORRESPONDENCE—PENALTY-ENVELOPE.

Where a member of Congress has addressed an inquiry about official business to a Department or any bureau thereof, the reply may properly be addressed to the person concerned in a penalty-envelope and sent unsealed to the member (that he may take cognizance of its contents), to be by him forwarded to its destination. But in such case the use of the envelope must be strictly limited to the Department or bureau and the applicant.

DEPARTMENT OF JUSTICE,
May 25, 1880.

SIR: Your communication of the 12th ultimo invites my attention to section 29 of the act approved March 3, 1879 (20 Stat., 362), entitled "An act making appropriations for the service of the Post-Office Department for the fiscal year ending June 30, 1880, and for other purposes," and to other acts bearing on the subject, and inquires whether the Treasury Department is authorized to transmit a communication to a member of Congress, or any other person, in an official envelope authorized by the section above named, unsealed, in order that the recipient may be advised of its contents, and that he may forward the letter to the party in interest without the payment of postage.

Official Correspondence—Penalty-Envelope.

In reply I would say that I think there is no impropriety, when a member of Congress has addressed an inquiry about official business to your Department or any of its bureaus, in having the reply addressed to the person concerned in a penalty-envelope and sent unsealed to the member, to be by him forwarded to the destination, so that he may take cognizance of the contents.

In order to avoid misapprehension, I ought to say that in my opinion such envelope should not be made the vehicle of any private communication from the member to whom it is thus sent; and, further, that such penalty-envelope should not be sent when the reply is to the member himself and is only intended to furnish him the basis of a letter to the applicant. The use of the envelope must be strictly limited to the communication between the Department and the applicant. If it should be found at any time that there was danger in this use of the envelope, the Department might adopt other means of communicating to the member, who had addressed it upon official business, the result of his inquiry, as the only object with which such penalty-envelope could be sent to him would be simply for the purpose of affording him this information.

Your inquiry also suggests whether such communications could be transmitted to others than members of Congress.

Members of Congress, from their official position, may fairly be presumed to be persons who will use the penalty-envelope only for the purpose heretofore suggested; and I can see no reason why other persons who you are satisfied, either from your personal or official connection with them, will make no other than a strictly official use of the envelope may not also be intrusted with the communication for the purpose of simply reading its contents, when they communicate with the Department upon an official subject.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. JOHN SHERMAN,
Secretary of the Treasury.

Minnesota Railroad Land-Grant.

MINNESOTA RAILROAD LAND-GRANT.

The grant to Minnesota made by the act of March 3, 1857, chap. 99, to aid in the construction of certain railroads, viz, of "every alternate section of land, designated by odd numbers, for six sections in width on each side of each of said roads and branches," was a grant of *particular* sections of land lying within prescribed lateral limits to the road, to each of which the grant attached (on the definite location of the road) by distinct terms of description. And the indemnity provision in the same grant, giving other lands (to be selected within fifteen miles from the line of the road) in lieu of such of the granted lands as should appear, when the road was definitely located, to be sold by the United States or to be pre-empted, was equally precise.

Held, accordingly, that the grant made by said act of 1857 was not one of quantity as distinguished from a grant of specified lands in place, and that a claim thereunder for an amount of land equal to one-half of six sections in width on each side of the road, or for six sections of land for every linear mile of road, including all sinuosities and deflections from a straight line, would be inadmissible.

The act of March 3, 1865, chap. 165, which declares (section 1) that "the quantity of lands granted to the State of Minnesota" by the said act of 1857 "shall be increased to ten sections per mile for each of said railroads and branches, subject to any and all limitations contained in said act and subsequent acts," &c., in effect only extended the lateral limits of the grant as made by the act of 1857 from "six" sections in width to "ten" sections in width on each side of the several roads and branches. The amendment thus introduced by the act of 1865 did not alter the character of the previous grant; this remained thereafter what it was before, a grant of lands in place as distinguished from a grant of quantity.

Under the provisions of said acts of 1857 and 1865, the State of Minnesota is entitled to indemnity for lands lying within the limits of the grant (*i. e.*, within ten miles from the line of definite location of the road) which it shall have lost by reason of the fact that such lands were sold by the United States or were pre-empted, whether the sale took place or the right of the pre-emptor attached before or after the date of the grant, provided the indemnity lands can be found within the proper indemnity limits (*viz*, within twenty miles from the line of the road).

But those provisions do not entitle the State to indemnity for lands which were never included within its grant, such as lands reserved to the United States by any act of Congress, or in other manner by competent authority, and excepted out of the grant. The indemnity is limited strictly by the sections lost in place, *i. e.*, sections which came within the terms of the grant, but which were previously, or have been subsequently, sold by the United States or pre-empted. It is not made in order that the State shall have necessarily a hundred sections of land for each ten miles in length of constructed road, but in order to make the grant good.

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Accordingly, if there were reservations to the United States within the limits of the grant, or if the State were not entitled to one hundred sections of land within those limits for any ten-mile division of constructed road in consequence of the curvatures or sinuosities of the road in such division, no right would exist for a deficiency thus arising.

DEPARTMENT OF JUSTICE,
June 5, 1880.

SIR: The letter of the Acting Commissioner of the General Land Office, accompanying your communication of the 4th instant, submits the following facts:

By an act of Congress approved March 3, 1857 (11 Stat., 195), there was granted to the then Territory of Minnesota, to aid in the construction of certain railroads, among which was a road "from Stillwater, by way of Saint Paul and Saint Anthony, to a point between the foot of Big Stone Lake and the mouth of Sioux Wood River, with a branch via Saint Cloud and Crow Wing to the navigable waters of the Red River of the North, * * * every alternate section of land, designated by odd numbers, for six sections in width on each side of said roads and branches." It provided that "in case it shall appear that the United States have, when the lines or routes of said roads and branches are definitely fixed, sold any sections or any parts thereof granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents to be appointed by the governor of said Territory or future State, to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tiers of sections above specified, so much land in alternate sections as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the rights of pre-emption have attached as aforesaid, * * * *Provided*, That the land to be so located shall in no case be further than fifteen miles from the lines of said roads or branches, and selected for and on account of each of said roads or branches." Any and all lands theretofore reserved to the United States for the purpose of aiding in any object of internal improvement, or for any other purpose whatever, were reserved from the operation of the said grant.

Section 4 declared "that the lands hereby granted to said

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Territory or future State shall be disposed of by said Territory or future State only in the manner following, that is to say: "That a quantity of land not exceeding one hundred and twenty sections for each of said roads and branches, and included within a continuous length of twenty miles of each of said roads and branches, may be sold; and when the governor of said Territory or future State shall certify to the Secretary of the Interior that any twenty continuous miles of any of said roads or branches is completed, then another quantity of land hereby granted, not to exceed one hundred and twenty sections, for each of said roads and branches having twenty continuous miles completed as aforesaid, and included within a continuous length of twenty miles of each of such roads or branches, may be sold; and so from time to time until said roads and branches are completed; and if any of said roads or branches is not completed within ten years, no further sale shall be made, and the lands unsold shall revert to the United States."

By an act of the legislature approved May 19, of the same year, the grant of March 3 was accepted on the terms, conditions, and restrictions therein contained; and an act passed May 22 granted to the Minnesota and Pacific Railroad Company to aid in the construction of several lines and branches of roads, including the branch from Saint Cloud to Crow Wing and the navigable waters of the Red River of the North, all the interest, present and prospective, of the Territory and future State of Minnesota, on said lines and branches, to any and all lands granted to the Territory by said act of March 3, together with all the rights, privileges and immunities conferred or intended by said act. A map of the definite location of the branch from Saint Anthony to Crow Wing was filed in the General Land Office December 5, 1857.

In 1862 (March 10) the legislature of the State, on account of the failure of the said Minnesota and Pacific Railroad Company to build and complete the road in accordance with the terms of the grant of May 22, 1857, aforesaid, created the Saint Paul and Pacific Railroad Company, and granted to it all the rights, benefits, and privileges, property and franchises of the first named company, including the lands.

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By joint resolution approved July 12, 1862 (12 Stat., 624), Congress provided that in lieu of the branch via Saint Cloud and Crow Wing to the navigable waters of the Red River there might be constructed a new branch line having its southwestern terminus at any point on the existing line between the Falls of Saint Anthony and Crow Wing, and extending in a northeasterly direction to the waters of Lake Superior; and in its aid there were granted "the alternate sections within six-mile limits of such new branch line of route * * * with a right of indemnity between the fifteen-mile limits thereof.

By an act approved March 3, 1865 (13 Stat., 526), Congress extended the time for the completion of certain railroads, among which was the one under consideration, and declared "That the quantity of lands granted to the State of Minnesota, to aid in the construction of certain railroads in said State, as indicated in the first section of an act entitled 'An act making a grant of land to the Territory of Minnesota in alternate sections, to aid in the construction of certain railroads in said Territory' * * * approved March third, eighteen hundred and fifty seven, shall be increased to ten sections per mile for each of said railroads and branches, subject to any and all limitations contained in said act and subsequent acts, and as hereinafter provided."

Section 2 provided that the first proviso in the first section of the act aforesaid should be so amended as to read as follows, to wit: "*Provided*, That the land to be so located shall in no case be further than twenty miles from the lines of said roads and branches, to aid in the construction of which said grant is made."

By section 3 similar exception to that contained in the grant of 1857 was made, of lands reserved to the United States for purposes of internal improvement; but it was provided "that any lands which may have been granted to the Territory or State of Minnesota for the purpose of aiding in the construction of any railroad, which lands may be located within the limits of this extension of said grant or grants, shall be deducted from the full quantity of lands hereby granted," &c.

The fourth section provided "That the sections and parts of sections of land, which by said acts and this grant shall

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remain to the United States, within ten miles on each side of said roads and branches, shall not be sold for less than double the minimum price of public lands when sold, nor shall any of said lands become subject to sale at private entry until the same shall have been first offered at public sale to the highest bidder at or above the minimum price as aforesaid."

The sixth section of the act provided for the disposal of the lands, the certification by the governor to the Secretary of the Interior upon the completion of any section of ten consecutive miles, and the patenting of lands granted not exceeding ten sections per mile.

By an act of March 3, 1873 (16 Stat., 588), Congress provided that, upon certain conditions, the Saint Paul and Pacific Railroad Company "may so alter and amend its branch lines that instead of constructing a road from Crow Wing to Saint Vincent, and from Saint Cloud to the waters of Lake Superior, it may locate and construct in lieu thereof a line from Crow Wing to Brainerd to intersect with the Northern Pacific, * * * with the same proportional grant of lands, to be taken in the same manner along said altered line as is provided for the present lines by existing laws."

By act of March 3, 1873 (17 Stat., 631), the time for the completion of the road from Saint Anthony to Brainerd was extended to December 3, 1873.

By act of June 22, 1874 (18 Stat., 203), the time for the completion of said branch (among others) was extended, upon certain conditions, until March 3, 1876. The company did not accept the conditions of that act, and upon that ground it has since been declared by the Interior Department inoperative.

Further legislative action by Congress has not been taken, but the State, by an act approved March 1, 1877, resumed the grant theretofore held by the said Saint Paul and Pacific Railroad Company, appertaining to the uncompleted portion between Watab and Brainerd, and conferred it upon a company to be organized in manner provided. In the event of a failure by said company to do and perform certain things within a specified time, then any company or corporation then organized, or to be thereafter organized, upon the performance of certain requirements, was to succeed to the rights intended to be conferred by the act, &c.

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Under this legislation the Western Railroad Company of Minnesota, a corporation duly qualified, succeeded to those rights, and completed and equipped the said line of road between Watab and Brainerd aforesaid, as appears from satisfactory evidence presented to your Department.

All objections known to the Interior Department to the approval of the lands due to the company having been removed, on February 18, 1879, you directed the General Land Office to prepare lists of lands inuring to the grant and submit them for your approval. Accordingly, on April 8 of that year, a list containing 121,502.31 acres of land, found to be vacant, and lying within ten miles of the road, was submitted to you, and received your approval on the 11th of the same month, and on the 21st patent was regularly executed.

A request is now made by the company for patent of the lands embraced in the indemnity selection, covering 153,089.34 acres; and, in order to properly decide upon this request, you submit to me two inquiries:

1. Is the grant of March 3, 1857, as altered or amended by the act of March 3, 1865, to be treated as a grant of quantity in the sense that the railroad is to be entitled to receive ten sections of land for each and every mile of road constructed by it?

2. Whether this be so or not, is the railroad company entitled to indemnity for the sections of land which may have been sold by the United States or pre-empted previous to the original grant of March 3, 1857?

1. The grant of March 3, 1857, was a grant of "every alternate section of land, designated by odd numbers, for six sections in width on each side of each of said roads and branches." This grant was therefore a grant of lands in place. It was a grant of *particular parcels* (sections) of land lying within prescribed lateral limits to the road, each of which was definitely marked out and numbered by the public surveys, and to each of which the grant attached by distinct terms of description. The indemnity which was provided for by the grant of lands in lieu of such of the lands thereby granted as might be found upon the definite location of the road to have been pre-empted or sold was equally precise, as such lieu lands were to be selected "from the lands of the United States nearest to the

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tiers of sections above specified, so much land in alternate sections, or parts of sections, as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the rights of pre-emption have attached as aforesaid." Such indemnity lands so located were to be in no case further than fifteen miles from the lines of said roads or branches.

The fourth section of the act provided for a disposition by the Territory or future State of the lands granted, and contemplated that the road itself was to be built in divisions of a continuous length of twenty miles each, the Territory or future State being entitled to sell a quantity of land not exceeding 120 sections for each division of twenty miles.

Upon consideration of this act, I am of opinion that no grant was intended which should be considered one of quantity as distinguished from a grant of lands in place. The location of the lands granted and of the indemnity lands is definitely stated. Both the granted lands and the indemnity lands together are in point of quantity *not to exceed* 120 sections for every twenty miles of road. The quantity might obviously be less than 120 sections, as under the grant (which is limited to the *odd-numbered sections* lying within the width of six sections on each side of the road, and does not call for *an amount of land* equal to the one-half of six sections in width on each side of the road) a claim to six sections for every linear mile of the road and its branches, including all sinuosities and deflections from a straight line, would not be tenable, and this according to what is deemed by me to be well settled law. (5 Opin., 518.)

If this was not a grant of quantity, but a grant of lands in place, did it become a grant of quantity by the operation of the statute of 1865?

The word "quantity" is undoubtedly used as a convenient mode of designating the possible amount of lands granted, and the first section of the act of 1865 increases the quantity of lands granted to the State of Minnesota, by the act of 1857, "to ten sections per mile for each of said railroads and branches, subject to any and all limitations contained in said act and subsequent acts, and as hereinafter provided." The effect of this is to amend the act of 1857 by substituting for the word "six" the word "ten"; and if the rest of the act be taken into

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consideration it will be satisfactorily seen that this is the full scope of the first section. An attempt is made to give to the word "limitations" in the clause above quoted the narrow and peculiar sense which it bears in the real-estate law; but this seems to me to be unwarranted. The meaning to be attributed to this clause is not different from that which it would have if it read "subject to all the terms and conditions in the act of March 3, 1857."

The second section of the act of 1865 provides that the location of the land "shall in no case be further than twenty miles from the lines of said roads and branches to aid in the construction of each of which said grant is made." The granted limits having been extended from six to ten, the indemnity limits are thus extended from fifteen to twenty.

The fourth section of the same act renews the provision in the original act, that the lands which "shall remain to the United States, within ten miles on each side of said roads and branches, shall not be sold for less than double the minimum price of public lands when sold"—contemplating that the United States is under this act, as under the act of 1857, to own the even sections.

The sixth section provides for the construction of the road in divisions of ten miles in length each, and the lands granted and selected, not exceeding ten sections per mile, are to be selected opposite to, and within a limit of, twenty miles of the line of the completed division, extending along the whole length thereof. The use of the phrase "not exceeding ten sections per mile" indicates that, owing to the sinuosities of the road, less than ten sections per mile may actually become due to the State for the construction of a mile of road. By this section it is also contemplated that it may be that the indemnity lands within particular divisions of ten miles may not be sufficient to compensate the loss in the granted lands appertaining to such divisions, and provision is made for such deficiency by a clause which may perhaps better be considered in connection with the second branch of your inquiry.

This case is readily distinguishable from the case of *The United States v. The Burlington and Missouri River Railroad Company*, in Nebraska, where the grant was held to be one of quantity as distinguished from a grant of lands in place.

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From the language used in that case, the grant was distinctly a grant to the amount of ten alternate sections; there were no lateral limits to the grant, and there was no indemnity provision. It was thus well held to be a grant of an amount of land by way of compensation for the public service of constructing the railroad.

In the view of the applicant, it would seem that this grant is at first a grant of lands in place, and that afterwards it becomes a grant of lands by the quantity. It can hardly bear this double character. Were this so, the indemnity would be used, not to compensate the applicant for that which it had lost alone, but, further, to give it the benefit of an additional grant.

In direct answer to your first inquiry, I am, then, of opinion that the grant is to be treated as a grant of lands in place as distinguished from a grant of an amount or quantity of land.

2. The second inquiry proposed, in view of the remarks that have been made in opinions of the learned judges of the Supreme Court, undoubtedly presents a question of considerable difficulty.

It is understood that up to the time of the decision of the case of *The Leavenworth, Lawrence and Galveston Railroad Company v. The United States* (92 U. S., 733) the rule of the Department had been to indemnify the railroad not only for lands which had been sold or pre-empted after the date of the passage of the granting act, but previous thereto, and that in consequence of the remarks made in that case the rule has been changed.

The case referred to involved the title to the Osage Indian lands in the State of Kansas; the question being whether said lands were reserved to the United States under the provisions of the Indian treaty, and also under the last proviso of the first section of the act of March 3, 1863, or were granted to the State of Kansas under the act of 1863, to aid in the construction of railroads. It was held that those lands never passed by the grant to the State of Kansas or the railroad companies; that they were reserved or excepted out of it; and therefore that the patents which had issued therefor had inprovidently issued. To that extent the decision is undoubtedly authority, and it must be held there-

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fore that all lands reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatever, under the last proviso of the first section of the act of March 3, 1857, do not pass to the railroad companies, nor are said companies entitled to indemnity therefor. In commenting *arguendo* upon the indemnity clause, Mr. Justice Davis remarks: "The words employed show clearly that its only purpose is to give sections beyond that limit" (the original ten-mile limit) "for those lost within it by the action of the Government between the date of the grant and the location of the road." But it is to be observed that he does not rest his decision upon this point, but upon the fact heretofore adverted to, that the lands in question (whose ownership he was then discussing) were excepted from the grant made. His remark, therefore, is a dictum entitled only to the weight which is given to the dicta of eminent judges.

In the case of *The United States v. The Burlington and Missouri River Railroad* (98 U. S., 334), the main question under discussion was whether the grant was or was not a grant of a specific amount or quantity of land. It was held to be one of quantity, and the selection of the land was subject, in the opinion of Mr. Justice Field, to certain limitations, the fourth of which was that it must not have been sold, reserved, or otherwise disposed of by the United States, and a pre-emption or homestead claim must not have attached to it at the time the line of the road was definitely located. In this case, however, there was no question of indemnity. Upon this part of the case, the grant being held to be one of quantity, the only inquiry was where the lands were to be selected which were to make up the quantity to which the road was entitled. The mere fact that in considering this question Mr. Justice Field, speaking of many other grants, incidentally remarks that they are intended to provide "for the selection of land elsewhere to make up any deficiency arising from the disposition of a portion of it within such limit between the date of the act and the location of the road," cannot be considered as a distinct expression of opinion by

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that learned judge that in a case like this only deficiencies were to be compensated when land had been disposed of by sale or pre-emption after the date of the act.

On the other hand, Mr. Justice Harlan, in an opinion (concurrent in by the circuit and district judges) in the case of *The Madison and Portage Railroad Company v. The Treasurer of the State of Wisconsin, &c.* (circuit court of the United States for the western district of Wisconsin), in commenting upon the mode in which deficiencies of lands in place were to be made up from indemnity limits, says: "In supplying deficiencies it must be by sections, whether full or fractional, and by legal subdivisions. Deficiencies in place limits caused by sales or pre-emptions previous to the location of routes, whether before or after the passage of the acts, may be supplied from the indemnity limits."

In view of these conflicting expressions, it would seem to me that the safer course for the Department would be to return to its original construction; and, while it holds that all lands reserved to the United States by any act of Congress, or in other manner by competent authority, do not pass to the railroad company, and that there can be no indemnity therefor, also to hold that, when lands have been sold or pre-empted along the line of the road within its granted limits, there should be indemnity for the lands thus lost, even if such sale or pre-emption took place previously to the date of the grant. This construction is in no wise in conflict with the decision made in the case of the Leavenworth, Lawrence and Galveston Railroad. It gives the company no title to indemnity for lands reserved from and excepted out of the grant, but does entitle it to indemnity when within the granted limits there are found lands which have been sold by the United States, or pre-empted, whether such sale or pre-emption took place prior or subsequently to the passage of the act of 1857, and prior or subsequently to the definite location of the road. But this indemnity can be carried no further than to compensate the railroad for the lands which it has thus lost. It cannot be extended so far as to indemnify the road for lands which were never included within its grant. When, therefore (act of March 3, 1865, section 6), a division of ten consecutive miles

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of road has been completed, the railroad is entitled to lands, not exceeding ten sections a mile, situated opposite to and within the limits of twenty miles of the line of said road, and within the lateral limits of the division. If such lands are not found within the granted limits of ten miles on each side of the road, then they may be obtained by the road within the corresponding indemnity limits. Until the road is finally completed, this is to be the arrangement as division after division is finished. As it may happen, however, that on certain divisions there may be neither within the granted limits nor within the indemnity limits sufficient public lands to satisfy the grant for such divisions, while on other divisions there may have been no deficiency, or there may have been more than enough within the indemnity limits to satisfy the deficiency, provision is made by which, at the completion of the railroad, the Secretary of the Interior "shall issue to the said State patents to all the remaining lands granted for and on account of said completed road and branches in this act, situate within the said limits of twenty miles from the line thereof, throughout the entire length of said road and branches." This language must be construed as intending that when the road is fully completed as required by law the company so completing it is entitled to lands in any or all divisions of its entire length to make up the losses sustained in any one division. But the scheme of the act distinctly shows that these selections are confined to such alternate odd-numbered sections as remain undisposed of in the respective divisions. It was only these sections which were included within either the granted or indemnity limits. And the indemnity is not made in order that the road shall have necessarily a hundred sections of land for each ten miles in length of its road, but only so far as it is required to make the grant good. If there were, therefore, reservations within the granted limits to the United States, or if the road was not entitled to one hundred sections of land for any ten miles constructed by it in consequence of the curvatures or sinuosities of the road in that division, there can be no indemnity for a deficiency thus arising. The indemnity is limited strictly by the sections lost in place, which were granted by the United

District of Columbia Eight per cent. Certificates.

States but were previously or subsequently sold or pre-empted.

In direct answer to your second inquiry, I am therefore of opinion that the road is entitled to indemnity, provided the lands can be found within the proper limits, for the lands which it may have lost by reason of the fact that lands within the granted limits were sold or pre-empted previously or subsequently to the date of the grant.

In view of the interest manifested in the questions submitted by you, on account of their relation to other railroads as well as the one immediately concerned, I have felt it my duty fully to hear arguments of all other parties who have deemed that their rights might be affected by any opinion which should be given in the present case.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. CARL SCHURZ,,

Secretary of the Interior.

DISTRICT OF COLUMBIA EIGHT PER CENT. CERTIFICATES.

The holders of overdue coupons of the 8 per cent. certificates issued under an act of the legislative assembly of the District of Columbia, approved May 29, 1873, are entitled to interest thereon at the rate of 6 per cent. per annum; and such interest should be allowed by the Treasurer of the United States where such coupons are tendered in payment of taxes for special improvements within the said District.

DEPARTMENT OF JUSTICE,

June 8, 1880.

SIR: In yours of the 9th of April last, the question is asked whether the Treasurer of the United States, as the successor of the Commissioners of the Sinking Fund of the District of Columbia, should allow interest from their maturity upon overdue coupons of the 8 per cent. certificates, issued under an act of the legislative assembly approved May 29, 1873, when tendered in payment of the taxes for special improvements, &c.; and, if so, at what rate such interest should be allowed.

Army Transportation over Pacific Railways.

The above question is, in substance, whether the District of Columbia is bound to pay interest upon the overdue coupons of its 8 per cent. certificates. These certificates and coupons are payable to bearer, and, therefore, no distinction is to be taken upon the point above made, between one or other of the *bona fide* holders who present them. Whether anything shall be allowed to such holders upon this state of facts is a question not at all affected by the circumstance that upon some other transaction they are themselves debtor to the District, and therefore themselves accountable *per contra* for interest. Under the circumstances detailed in the question above, I am of opinion that it is plain that the holders are entitled to interest (7 Wall., 82).

Inasmuch as the coupons in question do not express a rate of interest chargeable for delay in their payment, such interest is to be calculated thereon at the rate imposed by statute; that is, 6 per cent.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. JOHN SHERMAN,

Secretary of the Treasury.

ARMY TRANSPORTATION OVER PACIFIC RAILWAYS.

Under section 2, act of May 7, 1878, chap. 96, all compensation due for transportation for the Quartermaster's Department performed over such portions of the Union and Central Pacific Railroads as were built with the aid of Government bonds should be retained. And *advised* that all compensation due to the same roads (they being indebted to the United States upon subsidy bonds) for such transportation performed over those portions of roads owned, leased, controlled, and operated thereby, which were not built with the aid of Government bonds, be also retained, so that the question involved as to such portions of roads can be judicially determined. Same advice, on similar grounds, given in regard to compensation due for transportation performed over the Kansas Pacific, Denver Pacific, and Union Pacific consolidated, and in regard to compensation due for transportation performed over the Sioux City and Pacific and the Central Branch Union Pacific Railroads, and over lines owned, leased, controlled, and operated thereby.

Under section 5260 Rev. Stat., all compensation due for transportation for the Quartermaster's Department performed over the Kansas Pacific

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Railroad (as well over that portion which was not as over that portion which was built with the aid of Government bonds) should be withheld.

DEPARTMENT OF JUSTICE,
June 11, 1880.

SIR: Yours of the 7th ultimo refers to me certain questions suggested by the Quartermaster-General, to each of which I subjoin my answer in the order of presentation:

"1st. Shall all compensation due for transportation services rendered for the Quartermaster's Department over those portions of the Union and Central Pacific Railroads which were built by aid of Government bonds be withheld?"

Answer. Yes. The second section of the act of May 7, 1878, chap. 96, expressly declares: "SEC. 2. That *the whole* amount of compensation which may, from time to time, be due to said several railroad companies, respectively, for services rendered for the Government, shall be retained by the United States," &c. (20 Stat., 58). This act was intended to change the pre-existing law, and could hardly be made more explicit.

"2d. Shall full compensation be made for all transportation services rendered for the Quartermaster's Department over those portions of roads owned, leased, controlled, and operated by said Union and Central Pacific Railroad Companies which were not built by aid of Government bonds, or shall all compensation due for such services be withheld?"

Answer. Though the Supreme Court held, in *United States v. Kansas Pacific Railway Company* (99 U. S., 455), that the bonds issued to that corporation are not a lien beyond the one hundredth meridian, nor is the company liable for *five per cent.* of its earnings beyond that point, yet, in the following case, *United States v. Denver Pacific Railway Company* (99 U. S., 460), the court, in a note, based the exemption of the road from liability to have its compensation for Government transportation withheld upon the fact that the company (Denver Pacific Railway Company) was *not indebted* to the United States. The Central and Union Pacific Railroad Companies owning, leasing, controlling, and operating the branches referred to in this inquiry *are* indebted to the United States upon subsidy bonds. In this state of the decisions, I advise the retention of *all* compensation to these roads for services

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upon such branches, so that the question can be judicially determined.

"3d. Shall *all compensation* due for transportation services rendered for the Quartermaster's Department over that portion of the Kansas Pacific Railroad, 393 $\frac{1}{4}$ miles, which was built by aid of Government bonds, *or only one-half of such compensation*, be withheld?"

Answer. All compensation should be withheld over the entire length of this road, under Revised Statutes, section 5260, still in force, which declares:

"The Secretary of the Treasury is directed to withhold all payments to any railroad company and its assigns, on account of freights or transportation over their respective roads of any kind, to the amount of payments made by the United States for interest upon bonds of the United States issued to any such company, and which shall not have been reimbursed, together with 5 per centum of net earnings due and unapplied, as provided by law."

"4th. Shall any part, and, if so, what part, of the compensation due for transportation services rendered for the Quartermaster's Department over that portion of said Kansas Pacific Railroad, 244 miles, which was built without aid of Government bonds, be withheld?"

Answer. For reasons indicated in my reply to your second question, I think *all compensation* should be withheld as to this portion of that road, as well as to that in aid of which bonds issued.

Your fifth question states that the Kansas Pacific and Denver Pacific have been consolidated with the Union Pacific, and asks if payment for services over these lines should be withheld and applied to the debt of the Union Pacific.

Answer. As stated in the second answer, the compensation should be entirely withheld until otherwise directed by the court, because the Kansas Pacific Railway Company is indebted for interest paid by the United States upon its subsidy bonds, (Rev. Stat., sec. 5260).

"6th. Shall *all compensation* due for transportation for the Quartermaster's Department over those portions of the Sioux City and Pacific and the Central Branch Union Pacific Rail-

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roads, which were built by aid of Government bonds, be withheld, *or shall only one-half of such compensation be withheld?*"

Answer. All, because derelict in payment of interest. (Rev. Stat., sec. 5260.)

"7th. Shall any part, and if so what part, of the compensation due for transportation services rendered for the Quartermaster's Department over lines owned, leased, controlled and operated by said Sioux City and Pacific and Central Branch Union Pacific Railroad Companies, which were not built by aid from Government bonds be withheld?"

Answer. All, for reasons indicated in the second answer. (Rev. Stat., sec. 5260.)

None of these corporations appear to be affected by the act relating to the compensation of roads which received grants of land upon the condition of a free use of the road. Of course, considerations additional to those above suggested would arise as to any such company. The letters of the Secretary of War and of the Quartermaster-General are herewith returned as requested.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. JOHN SHERMAN,
Secretary of the Treasury.

RIGHT OF WAY OVER GOVERNMENT LAND AT WEST POINT.

The privilege conferred by the act of December 14, 1867, chap. 1, upon the Hudson River West Shore Railroad Company "to locate, construct, and operate its railroad on the shore line across the property belonging to the Government at West Point, in the State of New York," &c., became a franchise of that corporation assignable to any other company succeeding to its rights and franchises. Hence the North River Railway Company, having succeeded by transfer to the franchises, &c., of the first named company, is entitled to the privilege mentioned.

The Secretary of War cannot "materially" alter the location fixed by his predecessor in office and accepted by the railroad company.

The regulations adopted and approved by the Secretary of War, under the act of 1867 aforesaid, contemplated that changes therein might be made as future contingencies should require. The proposed series of regulations of June, 1880, may be adopted if it is deemed needful to do so, having due regard to the interests of the company.

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The Secretary of War may properly require the removal and rebuilding of the observatory, made necessary by the location of the railroad, to be done at the expense of the railroad company, as a condition of the use of such location; and, to assure the performance of that work by the company, he can accept security therefrom in the form of a deposit of a sufficient sum of money with a United States depository, to be returned on completion of the work.

The privilege granted by the said act of 1867 cannot be deemed forfeited by lapse of time, in the absence of a judicial proceeding declaring the forfeiture.

DEPARTMENT OF JUSTICE,

June 17, 1880.

SIR: Yours of yesterday, calling attention to the act of December 14, 1867, conferring a right of way across the Government grounds at West Point upon the Hudson River West Shore Railroad Company, and the original and subsequent locations agreed upon for the exercise of this right, the regulations made at various times relating to this matter, and the transfer of franchises, &c., whereby the North River Railway Company now claims to exercise the right given by said act of December 14, 1867, is before me.

You ask: 1. Is the "North River Railway Company" the legal successor of the Hudson River West Shore Railroad Company, in so far as are concerned the franchises and privileges granted by the act of December 14, 1867, and by the writings of my [your] predecessor?

Answer. The Hudson River West Shore Railroad Company was composed of the gentlemen named in its charter, their successors and assigns. Congress did not intend to give to these persons, as individuals, any peculiar privilege, nor to show special favor to this particular corporation. It simply acted so as to prevent the national ownership of ground which must be crossed by the track of any road running along this shore of the Hudson River from operating as a bar to the carrying out of a great enterprise. But for the nature of the title by which this land was held, it could have been taken by condemnation for the purposes of this road. The act of Congress proposed to remove this difficulty upon equitable terms. The right conferred by the act of December 14, 1867, became a franchise of the corporation mentioned, assignable to any other company succeeding to its general privileges,

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&c. Accepting as correct Mr. Pool's statement of the 10th instant, as to the various transfers from one corporation to another, this statement being one of the papers forwarded to me by you, I am of opinion that the North River Railway Company is the legal successor of the Hudson River West Shore Railroad Company.

2. In answer to your second question, I am of opinion that you have no power "to *materially* change the precise location" fixed by your predecessor and accepted by the company.

3. You ask: "Has the head of this Department the right to make, approve, and enforce a series of regulations anew, in this case, such a series as that suggested by the West Point board of officers, June, 1880?"

Answer. The act of December 14, 1867, authorizes the Hudson River West Shore Railroad Company "to locate, construct, and *operate* its railroad * * * under such regulations as shall be approved by the Secretary of War." Such regulations were in fact adopted, which contemplated (Art. 17) that changes might be made as subsequent contingencies should require. It is, therefore, in the power of the Secretary of War to alter such regulations, having due regard to the interests of the company, and such alterations would be binding upon the company. It follows that the regulations of June, 1880, may be adopted, if deemed a proper exercise of the power.

"4. Would it be lawful for the Secretary of War, or for any officer acting under his approval, to accept a sum of money by deposit to his credit, or otherwise, of the amount, and for the purposes and intentions expressed in Regulation 11, suggested by the board?"

Answer. It is a reasonable regulation of the location and construction of the road that the railway company should pay all damages which will accrue to the United States thereby. It is understood that the removal and rebuilding of the observatory will become necessary on account of the jar of the trains and the delicacy of the instruments. I am of opinion that the Secretary of War may properly require this removal and construction to be done by the railway company at its own expense, and as a condition of their using this location. While it may be doubtful whether he should accept a sum of

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money by deposit to his credit, or otherwise, I am of opinion, also, that he may require as security for the performance of the agreement by the railway company so to rebuild the observatory, that it shall deposit with the treasury, if it be there accepted, or, if not, with one of the United States depositories, the sum of \$50,000, or such other sum as he may think proper; the money to be returned if the agreement is kept.

5. Unless there be some statute declaring a forfeiture for non-user of the right conferred by the act of December 14, 1867 (to which my attention has not been called), I do not think it would be forfeited by the lapse of the time that has passed, without any judicial action to procure a judgment of forfeiture.

The papers transmitted with your letter are herewith returned.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. ALEXANDER RAMSEY,
Secretary of War.

APPOINTMENTS DURING RECESS OF THE SENATE.

The construction of the provision in the Constitution (Art. 2, sec. 2) investing the President with "power to fill up all vacancies that may happen during the recess of the Senate," &c., by which this provision is construed to comprehend all vacancies that may *happen to exist* in a recess of the Senate, and according to which the President has authority thereunder to fill during a recess of the Senate not only vacancies that have originated in the recess, but also such as originated whilst the Senate was in session—reaffirmed, upon full review of the opinions of former Attorneys-General on the same subject, all of which are shown to concur in that construction. And *semble* that the same construction has, in practice, been uniformly adopted by the Executive, at least since the time of President Monroe.

In the provision in section 3 of the tenure-of-office act of March 2, 1867, chap. 154 (which, with the amendment made by section 3 of the act of April 5, 1839, chap. 10, is reproduced in section 1769, Rev. Stat.), authorizing the President "to fill all vacancies which may happen during the recess of the Senate by reason of death, &c., by granting commissions which shall expire at the end of their next session thereafter," Congress must be presumed to have employed the words of the

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Constitution used therein, viz., "which may happen during the recess of the Senate," in the same sense in which they have been accepted and acted upon by the Executive branch of the Government. (Reaffirming opinion of Attorney-General Evarts, in 12 Opin., 449.)

The further provision in the same section (also in section 1769, Rev. Stat.) putting "in abeyance" an office "so vacant," &c., if no appointment thereto with the consent of the Senate is made "during such next session of the Senate," does not assume to act upon the power of appointment given to the President by the Constitution. It acts upon the office itself, but does not thus act until the expiration of the *next* session of the Senate. Hence, in the case of a vacancy which has originated during a session of the Senate, the office cannot be affected by that provision until the end of the succeeding session of the Senate; and during the intervening recess of the Senate the President may fill the vacancy by a temporary appointment.

Accordingly, where the office of collector of customs for the port of Philadelphia became vacant while the Senate was in session, by expiration of the term of the incumbent, and the President thereupon, during the same session of that body, sent to the Senate for confirmation the nomination of H. for the office; but the Senate having subsequently adjourned without acting upon the nomination, the President, during the recess thereof immediately following, appointed H. to fill the vacancy in said office by granting him a commission to expire at the end of the next ensuing session of the Senate: *Held*, That it was competent to the President thus to fill the vacancy by a temporary appointment.

DEPARTMENT OF JUSTICE,

June 18, 1880.

SIR: Your letter of the 17th instant informs me that the commission of A. P. Tutton, as collector of the port of Philadelphia, expired on the 31st of May last, while the Senate was in session; that the President, after that date, nominated John F. Hartranft to the office; and that the Senate adjourned on the 16th instant without acting upon said nomination. It further informs me that the President has now, under section 1769, Rev. Stat., appointed said Hartranft to fill the vacancy in said office, and that the commission of said Hartranft, signed by the President, is now presented for you to countersign.

I assume, of course, that this is a commission of the character contemplated by the Constitution when vacancies "may happen during the recess of the Senate," and is to expire, by its terms, at the end of its next session.

The question presented by you properly divides itself into

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two inquiries, namely: What is the constitutional authority of the President to act upon vacancies in offices existing during the recess of the Senate? and what effect is to be given to the legislation familiarly known as "the tenure-of-office act," embodied in the section 1769, Rev. Stat.?

The right given by the Constitution to the President in relation to this subject is in the following words:

"The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session."

The construction of this paragraph was early a subject of consideration. If it was to be understood as limiting the power of the President to fill by his temporary appointment only such vacancies as actually occurred by casualty after the Senate adjourned, it was obvious that many important offices would remain unfilled, and that the public interests might be seriously jeopardized thereby.

It will be found by a brief historical examination of the action of the Executive that the uniform construction has been that the words "may happen during the recess" are to be considered as equivalent to "may happen to exist during the recess"; and that the President is therefore entitled to fill, not only vacancies which have occurred subsequently to the adjournment of the Senate, but also such vacancies as existed during its session which it failed or refused to act upon. After careful examination, I am satisfied that not only has the practice of Presidents been uniform in this regard, but that it has been sustained, whenever brought into controversy, by the advice of the respective Attorneys-General.

The whole subject was first carefully examined by Mr. Attorney-General Wirt, in an opinion rendered October 22, 1823, to the then President. The question arose upon the following state of facts: The commission of General Swartwout, as navy agent at New York, had expired during the previous session of the Senate. The President had nominated a person who was not confirmed, and the vacancy existed after the adjournment of the Senate. The inquiry submitted to Mr. Wirt was whether, under the Constitution,

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the President could fill the vacancy by a commission to expire at the end of the next session of that body. The conclusion to which the Attorney-General came was that the President had power to fill, during the recess of the Senate, by a temporary appointment, a vacancy that had occurred by expiration of commission during a previous session of that body, the term in the Constitution, "may happen during the recess," being equivalent to "may happen to exist during the recess." It was further held by him that without such interpretation the provision of the Constitution could not be executed in its spirit, reason, and purpose. This opinion he enforces by an argument which seems clearly to show that, while such construction might not perhaps be strictly demanded by the mere letter of the Constitution, it is one imperatively required by those public considerations which induced the framers of that instrument to invest the President with this power of temporary appointment. While this argument has been subsequently restated and amplified by other Attorneys-General since Mr. Wirt, I respectfully refer you to it as eminently satisfactory. (1 Opin., 631.)

In 1832, the President had nominated a Mr. Gwinn as a register of the land office. This nomination was rejected, and a second nomination of the same gentleman was made at the same session of the Senate. Before adjournment the following resolution was offered :

"Resolved, That the President of the United States be informed that it is not the intention of the Senate to take any proceeding on the renomination of Samuel Gwinn to be register in the land office at Mount Salus, in Mississippi, during the present session."

This resolution was ordered to lie on the table, and the Senate adjourned without taking further action in the matter. Upon this state of things the President submitted to the then Attorney-General, Mr. Taney, the inquiry whether during the recess he was authorized to appoint Mr. Gwinn to the office in question ; and it was held that the President had power, during recesses of the Senate, to fill vacancies that might happen to exist in the subordinate offices of the Government, and that he was not limited in its exercise to those which first occurred during recesses. It was further held by the

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Attorney-General that it was the intention of the Constitution that the offices created by law, and which are necessary to the current operations of the Government, should always be full, and that, when vacancies happened, they should not be protracted beyond the time necessary for the President to fill them. It was said by him: "A government cannot go on, nor accomplish the purposes for which it was established, without having the services of proper officers to execute the various duties required by law. To guard against any abuse of the appointing power by the President, the approbation of the Senate is required. But as it was foreseen that, from the various contingencies and uncertainties to which human affairs are liable, vacancies might be found to exist, during the recess of the Senate, in offices which the public interest required to be filled, the power above mentioned was given to the President in order to provide against the evil of requiring a vacancy to continue in every case until the Senate could be convened; and the further evil of calling them together upon every one of the vacancies which might unexpectedly be found to exist during the recess. But the control of the Senate over appointments to such vacancies is effectually preserved by the limited term for which the President is authorized to make them. Suppose an officer to die in a distant part of the United States, and his death not to be known at Washington until after the adjournment; must the office remain vacant until the Senate can be convened? It is admitted by every one that the President may appoint in such cases, and the practice of the Government has continually conformed to that construction. But if the Constitution required that the office should be full at the time of the adjournment, and that the vacancy should take place afterwards, then the President could not appoint; for, in the cases above mentioned, the vacancy happens during the session, and the office is not full at the time of the adjournment." * * * "And if it falls out that, from death, inadvertence, or mistake, an office required by law to be filled is, in the recess, found to be vacant, then a vacancy has happened during the recess, and the President may fill it. This appears to be the common sense and natural import of the words used. They mean the same thing as if the Constitu-

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tion had said, 'if there happen to be any vacancies during the recess.'" * * * "And the word 'happen' is used to describe the class and kind of vacancies, and not the particular time at which they took place."

Attorney-General Taney also suggests another case indicating that a restricted construction could not be the one contemplated by the framers of the Constitution. If a nomination were made to a vacant office and were confirmed by the Senate, the office would still not be full until the person appointed should accept. If he should decline, and his refusal should not be known until after the adjournment, in such case the original vacancy would remain unfilled, and as it took place during the session, upon this restricted theory the President could not fill it. While Mr. Taney states that he knows of no precedent in favor of the limited construction, he cites a case which occurred in the time of the previous administration—that of Mr. John Quincy Adams—showing that the same construction had been placed by that President upon this provision of the Constitution as that given by himself. (2 Opin., 525.)

On October 22, 1841, Attorney-General Legare, in considering the same question, held that, a vacancy having occurred during a recess, and the President having filled it by a temporary appointment under the clause of the Constitution in question, and, after the meeting of the Senate, having made another nomination which was not acted upon by the Senate, and so the office being then vacant, the President had power to fill it again by granting a commission which should expire at the end of the next session of the Senate. He was also of opinion that whether the question were considered as one of pure legal science, or as matter of public expediency, it could not admit of doubt. (3 Opin., 673.)

On August 13, 1846, in an opinion rendered to the then President, Attorney-General Mason held that the Executive had the constitutional authority to fill up vacancies in the offices of postmasters (whose appointment was devolved upon him by the act of 2d July, 1836) which happened to exist during a recess of the Senate. "Even though the vacancy occurred before the session of the Senate, if that body, during its session, neglected to confirm a nomination to fill, the

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President may fill it by a temporary appointment; and public considerations seem to require him to do so."

Attorney-General Cushing, in an opinion rendered May 25, 1855, in discussing many other matters, states that he deems his predecessors to have thoroughly demonstrated and conclusively established as a doctrine of administrative law that the expression in the Constitution "all vacancies that may happen during the recess," signifies "all vacancies that may happen to exist in the recess." He adds: "and they concur in the general statement that, howsoever a vacancy happens to exist, if it exists, it may be filled by temporary appointment of the President. They will agree that it is the true spirit of the Constitution to have the offices, which Congress indicates to be needful by creating them, filled, though provisionally, rather than to remain vacant, or to force a special call of the Senate." (7 Opin., 189.)

On October 15, 1862, in an opinion rendered to the President, it was held by Attorney-General Bates, that the President had lawful power in the recess of the Senate to fill a vacancy on the bench of the Supreme Court, which vacancy existed during the previous session of the Senate, by "granting a commission which shall expire at the end of their next session." Mr. Bates treats the question as one that is settled, so far as a constitutional question can be settled, by the continued practice of the predecessors of the then President, and the reiterated opinions of the Attorneys-General, and deems this, up to that time, to have been sanctioned by the acquiescence of the Senate. Two days subsequently to the date of this opinion a commission of the character referred to in the opinion was issued to Mr. Justice Davis. (10 Opin., 356.)

On August 30, 1866, the same question was fully considered by Attorney-General Stanbery, in an elaborate opinion delivered to the Postmaster-General, in which he held that the President had full and independent power to fill vacancies in the recess of the Senate without any limitation as to the time when they first occurred. (12 Opin., 32.)

The question was again discussed by Attorney-General Evarts, on August 17, 1868, who held that the predicament of a vacancy which may be filled by a temporary appointment

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of the President under the Constitution is not confined by it to a vacancy originating or beginning to exist during the recess of the Senate, but embraces all vacancies that from any casualty happen to exist at a time when the Senate cannot be consulted as to filling. (12 Opin., 455.) This opinion is of the more importance, as it was the first opinion in which the effect of what is familiarly known as "the tenure of office act" was considered. But Mr. Evarts did not deem it necessary to more than refer to the constitutional arguments by which former Attorneys-General had supported this construction, upon which construction it was believed that every President had acted.

It became necessary for Mr. Evarts in the course of his opinion to consider the question (which also arises in this case) namely: What effect was intended by what is known as the "tenure of office act"? (March 2, 1867, 14 Stat., 430.) Although there has been some modification of that act (see act of April 5, 1869, 16 Stat., 7), I do not perceive that there has been any alteration in regard to the question before us. It was held by Mr. Evarts that it must be presumed that Congress in enacting the third section of the "tenure of office act," which provides that "the President shall have power to fill all vacancies which happen during the recess of the Senate by reason of death or resignation, by granting commissions which shall expire at the end of the next session thereof," accepted the words of the Constitution therein employed in the same sense in which they have been accepted and acted upon by the Executive branch of the Government. Into this clause the words "or expiration of term of office" have since been introduced, but the remark of Mr. Evarts is equally applicable. The "tenure of office act" did not assume to act upon the President's power of appointment which is given him by the Constitution, but by the latter clause of the third section (which is as follows: "And if no appointment, by and with the advice and consent of the Senate, shall be made to such office so vacant or temporarily filled as aforesaid, during such next session of the Senate, such office shall remain in abeyance, without any salary, fees, or emoluments attached thereto, until the same shall be filled by appointment thereto, by and with the advice and consent of the Senate; and dur-

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ing such time all the powers and duties belonging to such office shall be exercised by such other officer as may by law exercise such powers and duties in case of a vacancy in such office) it assumed to act upon the office, and for a limited time to destroy it and place the performance of its duties with some one other than the appropriate incumbent. For the time being the office practically ceased to exist, and was only revived by the assent of the Senate to an appointment thereto. Nor did this legislation assume thus to act upon the office until the expiration of the *next* session of the Senate. It was, therefore, held by Mr. Evarts that the language of the statute—which simply repeated the phrase from the Constitution, “which may happen during the recess of the Senate”—did not attempt any legislative interpretation of such phrase, and that there was nothing in the act which affected, or purported to affect, the President’s authority in filling the office until it should have fallen into the predicament of “abeyance” as described in the section. He farther held that this condition of “abeyance” was by express terms limited to arise upon the expiration of the next session of the Senate without the office having been filled by and with the advice and consent of the Senate. The President’s power was not, therefore, affected by such a condition until the expiration of a session of the Senate subsequent to that at which the vacancy occurred. When it is considered that this opinion was rendered at a time when the passage of the “tenure of office act” was still recent, and that for well understood and obvious political reasons it must have been the desire of the then President, in dealing with legislation novel in its character and apparently intended to limit his powers, to act cautiously and judiciously, it must be considered of great value apart from its reasoning, which seems eminently satisfactory.

The construction given by the Executive branch of the Government since the rendition of this opinion has entirely conformed to it. On April 24, 1875, it was held by Attorney-General Williams that it was competent for the President to fill two vacancies during the recess of Senate by temporary appointments, in the office of paymaster in the Army, which had occurred during the session of the Senate, and for which he had sent nominations to the Senate which had not been

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acted upon. He cites the opinion of Mr. Evarts and his predecessors, and deems the clear result of the discussion upon the constitutional clause to be that it confers upon the President full power to fill vacancies in the recess of the Senate irrespective of the time when said vacancies occur. (14 Opin., 562)

I am aware that this invariable construction given by the Executive Department has been from time to time disputed in the Senate; but legislation has never attempted to control it. That Congress may create offices, and may define their duties, emoluments, and limitations to their exercise, has never been questioned; and the "tenure of office act," in adopting the words of the Constitution and seeking to operate only in certain contingencies upon the office itself—namely, after the expiration of the session of the Senate following the time when the vacancy occurs—does not assume to trench upon the power of the President, and seems even to recognize the construction which all Presidents have placed upon that power.

The act of February 9, 1863 (Rev. Stat., sec. 1768), is as follows:

"No money shall be paid from the Treasury as salary to any person appointed during the recess of the Senate, to fill a vacancy in any existing office, if the vacancy existed while the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate, until such appointee has been confirmed by the Senate."

This legislation, in assuming to act upon the salary of officers appointed during the recess of the Senate when the vacancies actually existed while the Senate was in session, must be deemed a recognition by Congress of the invariable construction given by the Presidents to the power of appointment conferred upon them by the Constitution. In postponing the payment of the salary of the appointee until the Senate has given its assent to the appointment, it concedes the right of the President to appoint, although it undoubtedly embarrasses the exercise of that right by subjecting the appointee to conditions which are somewhat onerous.

In regard to judicial construction of the important inquiries contained in your letter, I have been able to find only one

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decision which distinctly bears upon the subject. The term of Mr. Gilpin had expired as United States Attorney for the eastern district of Pennsylvania while the Senate was in session. Mr. Gilpin, from some misconstruction of his duties, had continued to act. The President had nominated Mr. O'Neill to the office, but the Senate adjourned without confirming him. The President then appointed Mr. O'Neill by temporary commission. Mr. O'Neill was instructed by the then Attorney-General to act in all cases in which the United States was interested. Both gentlemen claimed to be recognized by the court as the district attorney. Judge Cadwalader held that it was quite clear that Mr. Gilpin's term had expired. He further held that the commission issued to Mr. O'Neill had no effect, and this upon the ground that the vacancy did not, within the meaning of the Constitution, happen during a recess of the Senate, and that the President therefore had no constitutional power to make a temporary appointment. Judge Cadwalader held further that Mr. O'Neill might properly exercise the duties of the office by virtue of the request of the Attorney-General, under his authority to employ counsel for the United States. As Judge Cadwalader held that Mr. O'Neill properly exercised the duties of the office by virtue of the appointment of the Attorney-General, it was of course not necessary that he should pass upon the inquiry whether the commission of the President had or had not full effect. He does, however, discuss this question at considerable length and with his usual ability. I do not deem it necessary to restate his arguments. A decision of a single judge of admitted ability, but of a subordinate court of the United States, cannot be considered of great authority or weight against the opinions I have cited and an administrative usage the discussion of which commenced as early as the time of President Monroe, and in reference to which such usage has been invariable.

As several opinions to which I have referred discuss the whole question with great minuteness and detail, it has seemed to me that I could better perform my duty by simply stating the results to which my predecessors have arrived, rather than by attempting to repeat arguments on a question upon which argument has been fully exhausted during the period

Foreign-Built Vessel.

that the matter has been under debate. At the risk of being tedious, I have restated historically the various stages of the discussion of this constitutional power of the President by calling attention to the individual opinions of my predecessors.

In direct answer to your inquiry, I am of opinion that the vacancy in the collectorship of the port of Philadelphia having occurred during the session of the Senate, and the Senate having adjourned without acting upon the nomination sent to it, the President may now appoint the nominee or any other person to fill the vacancy, by a temporary commission to expire at the end of the next session of the Senate, and that the condition of the office is not affected by any provision of the "tenure of office act," and will not be until the end of the next session of the Senate without confirmation of a nominee.

Very respectfully, your obedient servant,

CHAS. DEVENS.

HON. JOHN SHERMAN,
Secretary of the Treasury.

FOREIGN-BUILT VESSEL.

A foreign-built vessel, wholly owned by citizens of the United States, and having no foreign registry, is entitled by virtue of her American ownership to carry the American flag and to the protection of the American Government.

DEPARTMENT OF JUSTICE,

June 19, 1880.

SIR: Capt. H. W. Howgate submits to me (as I understand by your authority) the inquiry whether the steamship *Gulnare* is authorized to carry the American flag upon a proposed expedition to the Arctic Seas.

It was contemplated by the act of May 1, 1880, authorizing an expedition to the Arctic Seas, and the acceptance of the steamship *Gulnare* therefor, that such expedition would be made under the direction of the United States. The acceptance of the President was with the understanding that certain conditions would be complied with which have not as yet been fulfilled. There has been no such acceptance, therefore, as was contemplated by the act. Under these circumstances,

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it is stated to me by Captain Howgate that it is proposed to prosecute the expedition as a private one, and he submits the inquiry whether the steamer is entitled to carry the American flag.

The provisions of the navigation laws are commercial in their character, and intended mainly for the protection of American commerce and property upon the high seas. The vessel in question is a British-built vessel, had a British register, and, upon the facts as they appear before me, has now been sold to an American citizen and is his property. By the sale to an American citizen she has forfeited her British registry, as I understand the British law upon that subject.

The inquiry is, therefore: Is a foreign-built vessel, owned entirely by American citizens, and having no foreign registry, entitled to carry the American flag?

I am of opinion that such vessel *is* entitled to carry the American flag, and in this way to assert her own nationality and her claim upon the American Government for protection.

The haste in which I am required to answer this question prevents me from entering into any reasoning on the subject. I refer, however, to an opinion of Attorney-General Cushing upon the subject (6 Opin., 638), and also to an opinion of Mr. Beaman, of this Department, approved by Attorney General Akerman January 5, 1872.

Very respectfully, your obedient servant,

CHAS. DEVENS.

The PRESIDENT.

IMPROVEMENT OF NAVIGABLE WATERS OF THE UNITED STATES.

By the act of June 14, 1880, chap. 211, Congress made an appropriation for the improvement of Oakland harbor, in California, and provided that the same should not be available "until the right of the United States to the bed of the estuary and training-walls of this work is secured, free of expense to the Government, in a manner satisfactory to the Secretary of War." The estuary here referred to is a navigable water of the United States, and the training-walls of the work are located on the shore below high-water mark. *Held* (1) that the statute does not contemplate that the United States shall have necessarily an absolute title to the bed of the estuary and to such portions of the shore as are occupied by the training-walls; (2) that under the power

Improvement of Navigable Waters of the United States.

to regulate commerce—a power which includes that of regulating and improving navigable waters—the United States now have a right (which is deemed sufficient in this case) to use the bed and shore of the estuary for the purposes of said improvement by erecting training-walls or any other appropriate structure thereon, and that the proprietor of the soil can make no complaint of such use.

DEPARTMENT OF JUSTICE,

June 28, 1880.

SIR: Your letter of the 18th instant calls my attention to the report of the United States attorney for California, upon the subject of the title to the channel entrance to Oakland harbor, in that State. It also informs me that in the river and harbor act approved June, 1880, the following clause occurs:

“Improving Oakland harbor, California, sixty thousand dollars; and the sums of money heretofore appropriated for this improvement are hereby reappropriated, but the sums so appropriated and reappropriated shall not be available until the right of the United States to the bed of the estuary and training-walls of this work is secured, free of expense to the Government, in a manner satisfactory to the Secretary of War.”

Upon this report, in connection with the clause just quoted, you request my opinion upon the question whether the United States now has the legal right to the bed of the estuary and training-walls of this work.

Upon the facts, as stated by the United States attorney, the estuary in question is a navigable estuary, through which the tide ebbs and flows, and the training-walls of the work are below high-water mark. It is not necessary, therefore, to consider whether or not the soil of the beach between high and low water mark, or the bed of the estuary, belong to any private persons. The only question to be determined is whether the United States have such a right that, whatever may be the title of riparian proprietors, they may prosecute the work of improvement of the harbor, and erect such structures as they deem necessary for the purpose, without affording any just cause of complaint to such private owners.

The language of the clause is undoubtedly *ex industria*; and, while the right of the United States is to be secured (free of expense to the Government) to the bed of the estuary

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and training-walls, it is not contemplated that it shall have necessarily an absolute title, in the full sense of those words, to the bed of the estuary, or to such portions of the shore and bed as are occupied by the training-walls. The title to the lands which the United States proposes to use for the purpose of structures for the improvement of the harbor below high-water mark is derived from the State. But the State itself does not possess any right, either by virtue of its sovereignty or its ownership, which could in any way control the right of the United States, conferred by the Constitution, to regulate commerce. This right includes the right to regulate navigation, and hence to regulate and improve navigable waters; and this it may do by the erection of such structures as it deems necessary for the purpose, no matter what the effect may be upon the subordinate rights of the owners of the soil covered by such navigable waters. The bed of the estuary in question being the bed of a navigable stream, or a sheet of water, to the use of the harbor made by which training-walls and other structures are essential, they may be used as appropriately as culverts, drains, or embankments may be for the purpose of the construction and proper enjoyment of a public road.

The report of the United States attorney cites many authorities sustaining the proposition that private rights in land covered by navigable waters are necessarily subject to the higher rights of the public. I observe one, however, which failed to meet his attention, which gives a full and clear view of the whole subject. (*South Carolina v. Georgia et. al.*, 93 U. S., 4.) The whole subject is so elaborately discussed in this case that I deem it superfluous to do more than refer to it.

In direct answer to your inquiry, I am of opinion that the United States has a legal right to use the bed of the estuary in question for the purpose of said improvement by the erection of training-walls or any other appropriate structure, and that the owners of the soil can make no complaint of such use.

Very respectfully, your obedient servant,

CHAS. DEVENS.

HON. ALEXANDER RAMSEY,
Secretary of War.

Commissioner of the District of Columbia.

COMMISSIONER OF THE DISTRICT OF COLUMBIA.

By the act of June 11, 1878, chap. 180, authorizing the appointment of two Commissioners of the District of Columbia, and fixing their official term at "three years, and until their successors are appointed and qualified," it is provided that "the first appointment shall be one Commissioner for one year and one for two years, and at the expiration of their respective terms their successors shall be appointed for three years." A Commissioner who had received one of the first appointments under the act, being that made for two years, resigned, whereby the office became vacant before the expiration of the two years for which he was appointed. *Held* that the commission of his successor should be for the term of three years; the words of the statute, "and at the expiration of *their respective terms* their successors shall be appointed for three years," being construed to mean that when the term of the incumbent comes to an end, whether by its own limitation, or by death, resignation, or otherwise, the President is then and thereafter to appoint for the full term of three years.

DEPARTMENT OF JUSTICE,

July 7, 1880.

SIR: Referring to the memorandum (extract of statute as follows: "The official term of said Commissioners appointed from civil life shall be three years, and until their successors are appointed and qualified; but the first appointment shall be one Commissioner for one year and one for two years, and at the expiration of their respective terms their successors shall be appointed for three years") together with your inquiry endorsed thereon as to whether the commission of Major Morgan should not be for three years, I would say that this matter was examined by me at the time that Mr. Morgan was nominated to the Senate (Mr. Phelps having resigned before the conclusion of his term of two years), and I orally expressed, either to yourself or Mr. Rogers, the private secretary, the opinion that the nomination should be made for three years, and that Major Morgan should not be nominated for the unexpired portion of the term for which Colonel Phelps had been appointed. This is, I think, the true construction of the statute. The words "at the expiration of *their respective terms*" indicates that when the term

District Attorney—Temporary Appointment.

of the officer comes to an end, either by death, resignation, or its own limitation, the President is then to appoint for three years. If it had been intended that no appointment should be made for three years until the expiration of the terms respectively of one and two years, the words which Congress would have used to express their idea would have been either "of these respective terms" or "of these terms respectively"; and provision would have been made in the act for the filling of any unexpired portions of such original terms which might occur. The use of the personal pronoun "their" indicates that when the terms of the individuals appointed come to an end then the nomination is to be made for three years. Unless this construction is correct, the statute gives no authority to fill the office during such portion of the term of one of the Commissioners first appointed which might remain unexpired when he vacated it by death or resignation. It will be observed also that, if it was intended permanently to keep these officers in distinct classes, it would have been necessary to have provided that after the permanent appointment for three years had been made, appointments should be made for portions of such unexpired terms whenever vacancies occurred therein by death, resignation, or removal. No such provision is found.

In this connection, I would call your attention to the fact that the Senate have assented to the construction here indicated by confirming Major Morgan as he was nominated—for three years.

Very respectfully, your obedient servant,

CHAS. DEVENS.

The PRESIDENT.

DISTRICT ATTORNEY—TEMPORARY APPOINTMENT.

Where the office of district attorney became vacant during a session of the Senate, and was provisionally filled by an appointment made by the circuit justice under section 793, Revised Statutes: *Held*, that it was competent to the President during the next following recess of the Senate, while the office was still provisionally filled as aforesaid, to make a temporary appointment thereto, to expire at the end of the next session of the Senate thereafter.

District Attorney—Temporary Appointment.

The appointment of the circuit justice, authorized by said section, contemplates only a temporary mode of having the duties of the office performed until the President acts. The office is not the less *vacant*, notwithstanding the appointment of the circuit justice, so far as the President's power of appointment is concerned.

DEPARTMENT OF JUSTICE,
July 9, 1880.

SIR: The telegraph informs me that the gentleman temporarily appointed by Mr. Justice Bradley to be United States attorney for the northern and middle districts of Alabama, under section 793, Revised Statutes, declines to surrender the office to you, and claims that the President has no authority to make an appointment, except when the vacancy first occurs during a recess of the Senate.

I inclose a copy of an opinion which was delivered to the Secretary of the Treasury on June 18, 1880, upon the question whether, in case a vacancy existed during a recess of the Senate, which vacancy had first occurred during a session of the Senate, the President was entitled to appoint.

You will see from an examination of that opinion that this power has been asserted, so far as known, by all Attorneys-General and Presidents; and an examination of the legislation of Congress will also show that such legislation has not in any way been inconsistent with the construction placed by the Presidents upon their power; namely, that the words in the Constitution, "which may happen during the recess of the Senate," are to be construed as if written "which may happen to exist during the recess of the Senate." In the case considered in that opinion it was therefore held by me that the office of collector having become vacant for the first time during the session of the Senate, the President having nominated General Hartranft to the office, and the Senate having neglected to act upon that nomination, the President might properly appoint General Hartranft during the recess by a temporary commission.

Your own case differs in no respect from that of General Hartranft, with this exception, that a temporary appointment has been made by Mr. Justice Bradley by virtue of section 793, Revised Statutes. The authority given to fill the office

SAVANNAH RIVER IMPROVEMENT.

to the circuit justice is an authority only to fill it until action is taken by the President. The office in no respect ceases to be vacant in the sense of the Constitution because of this appointment, for the reason that the appointment itself contemplates only a temporary mode of having the duties of the office performed until the President acts by an appointment. Accordingly, upon examining section 793, it will be seen that the temporary appointment which the circuit justice may make is not until an appointment shall be made "by the President by and with the advice and consent of the Senate," but until an appointment is made "by the President, and the appointee is duly qualified, and no longer." Assuming then, as I will assume in this letter, that the opinion heretofore given by me is correct, and that the President is entitled to fill vacancies which happen to exist during the recess of the Senate, he is entitled to fill this vacancy. The office is not the less vacant, so far as his power of appointment is concerned, when the only power conferred upon any one else is a power to make an appointment which shall entitle the appointee to serve until an appointment is made by the President, and no longer.

You will use your utmost exertions to assert the authority of the President in this matter, and to have yourself recognized (as I believe you are fully entitled to be recognized) by the court as the district attorney under the temporary commission of the President, which operates until the end of the next session of the Senate, unless sooner revoked.

Very respectfully,

CHAS. DEVENS.

WILLIAM H. SMITH, Esq.,

United States Attorney, Montgomery, Ala.

SAVANNAH RIVER IMPROVEMENT.

On examination of the provisions of the act of the Georgia legislature approved October 8, 1879, and upon considerations stated in the opinion: *Held* that payment of the \$1,000 awarded under that act to the owner of the point on Fig Island, which is contemplated to be removed by the United States in the work of improving the Savannah River, cannot be paid out of the amount appropriated for the continuance of that work; and *advised* that special legislation by Congress, providing

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for the payment, should not be had until the express assent of the State of Georgia to the acquisition and removal of the land by the United States is obtained.

DEPARTMENT OF JUSTICE,

July 10, 1880.

SIR: Yours of the 28th ultimo inquires whether payment of \$1,000, awarded under act of the Georgia legislature, approved October 8; 1879, to the owner of the point of Fig Island which is to be taken and removed by the United States in the progress of the improvement of the Savannah River, can be paid out of the general appropriation for that work, or whether some special act must be obtained for the purpose.

I will state briefly my reasons for thinking that under the circumstances, as indicated to me by your letter and the accompanying papers, herewith returned as requested, the payment cannot be made under existing legislation, and that no special act ought to be passed until the express assent of Georgia to the acquisition and removal of the land by the United States is obtained.

Many of the States have general provisions of law whereby the United States can, whenever it becomes necessary, acquire lands within the limits of such States for a federal purpose; but I am not informed, and have not been able to ascertain, that there has been any other legislative action upon the part of the State of Georgia, pertinent to the present inquiry, than the before-mentioned act of October 8, 1879.

I desire first to examine and state the substance of the several sections of this enactment, noticing later the preamble which precedes them. Section 1 provides "That the agent of the United States and the mayor of the city of Savannah shall mark out by metes and bounds the lands so necessary to be taken as aforesaid, for the purposes aforesaid, and advise the respective owners thereof." The United States is not allowed to judge for itself what ought to be taken to properly prosecute the work, perhaps because it was thought those who elected the mayor of Savannah had a local, special interest in the work, in addition to the common public interest; so he is allowed for them an equal voice as to the extent of the territory to be condemned. At this, the earliest opportunity, I

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wish to say that the mayor of Savannah seems, in each and every instance, to have used the power conferred upon him by this act properly, judiciously, in entire good faith, and with a due regard to the interests of the United States. This first section proceeds to declare that after being thus notified, "if the said agent of the United States and the respective owners cannot agree upon the compensation to be paid the owner for the taking of the land, then the governor of this State shall appoint one person, the owner of the land another, and these two shall select a third person, which three persons shall constitute a commission to assess and determine the just and adequate compensation to be paid the owner." It may be noticed in passing that the United States is not heard in the composition of this commission, while the land owner is heard. The section then requires a written award, and gives to the owner (but not to the United States) a right of appeal to the superior court of Chatham County, and a jury trial there, and then declares that "the award so filed, if no appeal, and the judgment of the court, if there be an appeal, shall pass the title to the said land out of the owner *into the State of Georgia* upon the payment (by the United States) of the amount of the award or the judgment as the case may be."

The second section provides for speeding the cause in case of appeal, and for summary exceptions and hearing thereon. "A copy of the bill of exceptions shall be served on the mayor of the city of Savannah within two days of the certificate of the judge," but no service upon the agent of the United States is required. In like manner the owner is allowed to move for a new trial, and to except to a refusal of it.

"SEC. 3. *Be it further enacted*, That should the mayor of the city of Savannah not be satisfied with the award of the commissioners, an appeal may be taken in the name of the State in the manner provided for the owners in the first section," &c.

The subsequent proceedings upon the mayor's appeal were to be similar to those in the case of an appeal by the land owner.

The commission awarded \$2,500, and the mayor appealed.

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A jury of the vicinage gave verdict for \$600. The land owner obtained a new trial, and this verdict of \$1,000 is the result.

That the United States was not compelled either to pay the \$2,500 first awarded, or to forego the mode of improvement deemed most advantageous, is attributable to the exercise of the mayor's right of appeal.

The purpose to be subserved in the present case is not such as to require or authorize Congress to exercise the exclusive jurisdiction conferred by the eighth section of the first article of the Constitution, nor to bring it within the purview of Revised Statutes, section 355, enacted to carry out this constitutional provision. It is neither necessary nor desirable for the United States to exercise *any* jurisdiction or to affect that of the State; but, paying the purchase money, the United States should, at least, have the title and rights pertaining to individual ownership.

Though the power to take through the medium of the federal courts was contested in former years, and a bill regulating the method of procedure was resisted and not allowed to pass (see Cong. Globe, first session Thirty-sixth Congress, A. D., 1859-'60, part 2, pages 1790 to 1793, and part 4, page 3297), yet the Supreme Court of the United States have decided, five years ago, that this right does exist in the United States, because it is inherent in the very idea of sovereignty, "an inseparable incident of sovereignty." (*Kohl v. United States*, 91 U. S., 367; *Geisy v. Railroad Company*, 4 Ohio State Reps., 423, 424, and the leading authorities upon constitutional law.)

One eminent writer and jurist, Cooley, J., giving the opinion of the Michigan court, in *Trombley v. Humphrey*, 23 Mich., 472, (cited and approved in 91 U. S., 373, bottom,) asserts that the condemnation and assessment of damages must be had in a court of the nation or State, as this may be the party desiring to use the property taken.

The fifth amendment to the Constitution confers upon the General Government the right to take property for *any* purpose, acquiring jurisdiction only under the circumstances mentioned in the eighth section of the first article. (91 U. S., 372, 373.)

As the question may, perhaps, still be considered not quite

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settled, and the object to be attained is important to the United States, and especially so to Georgia and the neighboring States, I would not advise against the payment of the sum awarded under the proceedings had in the local courts, if, by the legislation authorizing them, the United States acquired any *title* to the property for which it pays. Such is not the case. Reference to the before-quoted language of the first section of the act of the Georgia legislature approved October 8, 1879, shows that compliance with the provisions of the act "shall pass the title to the said land out of the owner *into the State of Georgia* upon the payment of the amount of the award," &c.

The question whether or not the general legislation appropriating certain sums for the improvement of the Savannah River satisfies the requirements of Revised Statutes, section 3736—"No land shall be purchased on account of the United States, except under a law authorizing such purchase"—does not arise in the present case; because, though the public money is paid out, the United States does not acquire the ordinary rights of a purchaser. The title passes to the State of Georgia. To its power of eminent domain the State thus adds the rights of private proprietorship.

Such is not the usual course of legislation where property is taken for a public use, through the instrumentality of municipalities, corporations, or otherwise. The Supreme Court of Massachusetts, through its chief justice, in *Burt v. Merchants' Insurance Company*, 106 Mass., 362, said: "The usual method of making the appropriation is to authorize some corporation to take the property in the manner prescribed by a statute. In this manner the right of eminent domain is exercised by railroad, turnpike, canal, and aqueduct corporations, *and the property passes, NOT TO THE STATE, but to them.*"

So, in *Gilmer v. Lime Point*, 18 Cal., 251, Baldwin, J., said, with the concurrence of his associates, Cope, J., and Field, C. J.: "Where private property is taken for the purposes of railroads, aqueducts, canals, turnpikes, &c., the State usually makes the application through the agency of private corporations, to *which she transfers the ownership of the property taken.* And it seems not to be important whether the corporation

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through whose instrumentality the object is to be attained be a domestic or foreign corporation." (Cases cited.)

In the matter of Townsend, 39 N. Y., 171, is an instance of taking by and title vested in a corporation created by a State other than that in which the property taken was situated.

The construction of railroads has made this matter too familiar to permit the further citation of cases. No reason is perceived why the United States should not take the same title that an incorporated improvement company would under legislation of the customary character upon the subject. If it be said that no title was necessary, because the soil was to be removed to the level of the river bed, my answer is that title was needed in order so to remove it. The United States would have no *more* right to dig away the land of the State of Georgia than that of Patrick K. Sheils, the prior owner. Not one word in either section of the act of October 8, 1879, gives any consent of the State to the removal of the soil. The only possible argument that could be suggested, in support of the right of removal by the United States, is that consent is *implied* by the language of the preamble, though not expressly contained therein. The title of the act and the preamble are as follows :

"AN ACT to provide for the improvement of the Savannah River.

"Whereas there is a public necessity that the channel of the Savannah River, a navigable river in this State, shall be improved by straightening, widening, and deepening the same near, opposite, and within the city of Savannah; in order that the said stream may be made more available and useful for the purposes of navigation and commerce, a purpose which is common, useful, and of necessity to the whole people of the State of Georgia. And whereas for this purpose it is necessary to take and cut off portions of land from Hutchinson's Island and from Fig Island, making those portions a part of the bed of the stream. And whereas the Government of the United States has made appropriations of money for the purpose of accomplishing the work aforesaid, and its officers and agents are now ready to prosecute the work and to pay to the owners of the land so necessary to be taken a reasonable compensation for the same. And whereas

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the same work will serve a public purpose both as to the United States and to the State of Georgia.

"SEC. 1. *Be it enacted*," &c., as hereinbefore indicated.

These considerations induced the legislature to provide for the taking of the property of Patrick K. Sheils, and transferring the title thereto "into the State of Georgia," thereby retaining a control over the premises. For aught that appears, the State of Georgia or city of Savannah may be willing to have the work done and to co-operate in doing it, but yet desire to direct the method differently from that proposed to and accepted by Congress, or to be so situated as to control it. Be that as it may, the absolute legal title does not go to the United States, nor is the consent to its operations expressed.

The preamble to an act, as Maxwell says, "usually states or professes to state the general object and intention of the legislature in passing the enactment." That object was the improvement of the Savannah River, it being, it is true, a part of the contemplated improvement to remove a portion of Fig Island. The same author adds that therefore the preamble "may legitimately be consulted for the purpose of solving any ambiguity or fixing the meaning of words which may have more than one, or determining the scope or limit of the effect of the act *whenever the enacting part is in any of these respects open to doubt*." (Maxwell on Statutes, 35, 36.) He states the converse also: "But the preamble cannot either restrict or extend the enacting part when the language of the latter is plain, and not open to doubt either as to its meaning or its scope." (*Ib.* 39, top.) It is extremely probable that the officers in charge of this improvement would not be interfered with by the State of Georgia if they went on to remove this point of land; but it should not be left as a matter of *supposed* non-interference. The consent of the legislature should be absolute, unequivocal, and irrevocable, so that the United States could proceed in the exercise of an unquestionable right. Such has been the character of the legislation under which action was taken in the cases already cited. The first section of the Massachusetts act, as given in a note to *Burt v. Insurance Company*, 106 Mass., 357, pro-

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vided that "the consent of this Commonwealth is hereby granted to the United States to the purchase of additional land for the site of the new post-office," &c. The purchase was by condemnation. The second section regulates the appraisalment of damages, and provides that upon "their payment the fee of the said estate shall be forever vested in the United States." (*Ib.*, 358.)

The proceedings in California were under a general statute authorizing the condemnation of lands in that State upon the application of any authorized agent of the United States, and provided for the execution of a deed of the said land, "which said deed shall convey to the United States a good and absolute title to the said lands, against all persons whatever." (18 Cal., 248.)

In order to bring water to this city, an aqueduct bridge had to be built over "the Cabin John Creek" and lands taken in Maryland. The legislature of that State assented to this by act, chapter 179, approved May 3, 1853. After a preamble, reciting the object to be attained, the appropriation therefor, the necessity for consent, the first section enacts that if the plan adopted should require it, "consent is hereby given to the United States to purchase such lands," &c. (Laws of Maryland, A. D. 1853, page 208; *Reddall v. Bryan*, 14 Md., 444.) Numberless other similar statutes might doubtless be referred to, but I have only mentioned these three, to which my attention was attracted by the cases cited.

As the legislation you have invited me to consider neither gives the United States any title to any portion of Fig Island, nor any unambiguous consent to the excavation of any part of it, I do not think the \$1,000 assessed as damages can be paid out of the sum appropriated for the continuance of the improvement of the Savannah River, nor from any other fund in the United States Treasury.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. ALEXANDER RAMSEY,

Secretary of War.

Port of Genesee—Transportation in Bond.

PORT OF GENESEE—TRANSPORTATION IN BOND.

The act of March 14, 1876, chap. 23, extending "the privileges of sections 2990 to 2997 of the Revised Statutes, inclusive" (i. e., the privilege of transportation in bond), to the port of Genesee, New York, is not repealed by the act of June 10, 1880, chap. 190, which repeals those sections and substitutes therefor other provisions.

The former act conferred upon the port of Genesee a right to participate in the privileges of the class of ports mentioned in section 2997, as defined in the other sections above referred to, and as they might thereafter be defined in any subsequent legislation to be substituted therefor. Accordingly, the privileges to which that port is now entitled are those set forth in the latter act for the same class of ports (the ports designated in section 7 of the act).

DEPARTMENT OF JUSTICE,

August 4, 1880.

SIR: The case of "the Port of Genesee," submitted for consideration in yours of the 30th ultimo, is in substance as follows:

Section 2990 of the Revised Statutes confers upon certain ports the privilege of *importing in bond through other ports therein named*. Thereupon sections 2991 to 2996, inclusive, define the terms, methods, and other details of such importation, and section 2997 enumerates the ports upon which such privilege is conferred.

By the act of 1876, chap. 23, "the privileges of sections 2990 to 2997 Revised Statutes, inclusive, [are] extended to the port of Genesee, in the State of New York."

By an act passed at their recent session (June 10, 1880), Congress recast the provisions of the sections above mentioned, and thereupon also expressly *repealed* them. The changes in such provisions concern the character of the merchandise allowed to be imported, the ports *through which* such importation may be effected, and the provisions for keeping accounts and securing duties.

By the act of 1880 the number of both classes of ports is largely increased. But the port of Genesee is not one of those enumerated in section 7 as entitled to the "privilege of immediate importation." Questions, therefore, arise (1) whether the act of 1876, above referred to, has by such

Port of Genesee—Transportation in Bond.

legislation been repealed; and, if not, (2) what is the present condition of the port of Genesee as regards the above privilege.

Upon consideration, I am of opinion that the act of 1876 has not been repealed, and also that the privileges to which the port of Genesee is entitled are those set forth in the act of June 10, 1880.

In the first place, I remark that there is no express repeal of the act of 1876, and likewise no contradiction between its terms and those of the act of 1880.

The precise question, therefore, is whether the act of 1876 has been vacated or annulled by such subsequent legislation.

In my opinion it was intended by the above act of 1876 to confer upon the port of Genesee a right to participate in the privileges of the class of ports mentioned in section 2997 as defined for the time in the sections immediately preceding, and as they might thereafter be defined in any subsequent legislation to be substituted therefor. The privileges in question are not of the nature of *property*, but are merely certain public functions connected with the customs system conferred only in the interest of the community at large, and depending as regards the scope and permanence of their details upon such interest alone. These might, therefore, be expected to fluctuate without affecting the right of any port named in that connection to participate therein as before. The proper way of disconnecting a port with the system would be a repeal of the act which had originally caused the connection, for instance, here, the act of 1876. It seems plain that a mere change of the names in the list of ports contained in the Revised Statutes would not affect the right of a port which derived its title to the privileges in question from a different statute.

In the present case the act of 1880 only effects a change of the detail of privileges, together with a change in the list of privileged ports as contained in the *Revised Statutes*. It therefore expressly repeals only such legislation as in point of matter it contradicts. In my view neither the new matter nor the formal repeal affects the title of the port of Genesee, which is derived from a separate act, and which, as I have said, is not a title only to the privileges defined in the Revised

Case of Charles L. Phillips.

Statutes, but as well to such as under any development of the particular policy should be substituted therefor.

Very respectfully,

S. F. PHILLIPS,
Acting Attorney-General.

THE SECRETARY OF THE TREASURY.

CASE OF CHARLES L. PHILLIPS.

P., a midshipman, was nominated and confirmed in March, 1868, to be ensign, the promotion being made "subject to examination." In July, 1868—having never been examined—he was tried by a naval court-martial as a midshipman, and sentenced to dismissal from the service. *Held* that, under the circumstances, he was properly tried as a midshipman.

The minority of some of the members of the court-martial is not available as an objection to the validity of its proceedings.

Notification by the Secretary of the Navy of the approval by the President of the sentence is sufficient evidence both of approval and promulgation.

DEPARTMENT OF JUSTICE,
August 7, 1880.

SIR: In the matter of the application of Charles L. Phillips, dismissed from the Navy in July, 1868, which application was by you referred to me on the 2d instant, I have the honor to report that, in my judgment, the case is not one that calls for any action upon the part of the Executive. Mr. Phillips admits himself guilty of the gross, willful, and inexcusable act of disobedience for which he was dismissed. He bases his application for reinstatement *wholly* upon technicalities, showing no claim upon the merits. His technical objections are unfounded.

First. He says he was nominated March 10, and confirmed March 24, 1868, to be ensign, and was tried on the 3d of July following as midshipman. He omits to state that his promotion, because made while he was in a distant and foreign station, was "subject to examination." He never was examined; therefore never was an ensign, and was properly tried as a midshipman.

Rank of Aids of the General of the Army.

Second. Though he expressly stated, when brought before the court, that he had no objection to any member of it, and pleaded guilty (see top of page 13 of his letter to Hon. William D. Kelley), he now objects, twelve years later, that two of the members were minors. He bases this objection upon the assumption that the rules of the common law apply to the composition of a court-martial, and that minority would be such an objection as would invalidate the verdict of a jury, or a judgment thereon. Whatever effect this fact would have in a common-law court, it has nothing to do with the action of a court-martial, which exists by virtue of statute and regulations conformable thereto. In the present instance the statutory requirements were complied with.

Third. He complains that the sentence was not approved by the President nor promulgated. He was notified by the Secretary of the Navy of the approval by the President of the sentence as modified by him (the President). This is evidence both of approval and promulgation. The President acts through the Secretaries of the War and Navy in such matters. A promulgation is not necessarily a publication in a newspaper.

The legal propositions of this letter are sustained by last term's decision of the Supreme Court in *Ex parte Reed* (100 U. S. Reps., 13.)

There is no reason to recognize Mr. Phillips as having been in the Navy since 1868, nor in giving him any ground for claiming salary for twelve years which have since elapsed.

Very respectfully, yours,

EDWIN B. SMITH,
Acting Attorney-General.

The PRESIDENT.

RANK OF AIDS OF THE GENERAL OF THE ARMY.

Advised that the construction of the law as given by Judge-Advocate-General Holt, and since acquiesced in and followed in several instances by the War Department, be adhered to, namely: That the rank conferred by section 1096 Rev. Stat. upon the aids selected by the General of the Army thereunder entitles such aids to the precedence, when

Dam at Lake Winnibigoshish.

serving upon courts-martial, courts of inquiry, military boards, and the like, to which the same rank would entitle an officer of the line or staff (independent of the office of aid) when thus serving.

DEPARTMENT OF JUSTICE,
August 11, 1880.

SIR: Yours of 30th ultimo calls my attention to the Revised Statutes: "SEC. 1096. The General may select from the Army such number of aids, not exceeding six, as he may deem necessary, who shall have, while serving on his staff, the rank of colonel of cavalry." You ask, "Does the rank given under section 1096 Revised Statutes entitle its holder to the same precedence as like rank (independent of the office of aide-de-camp) gives to an officer of the line or staff of the Army when serving upon military boards, courts of inquiry, courts-martial, and the like?"

Judge-Advocate-General Holt answered this question in the affirmative, and the War Department has hitherto acquiesced in his construction of the law.

The phrase "while serving on his staff" is susceptible of two interpretations: as indicating the *character* of the duty performed, or the *time* during which the relation to the General exists. Inasmuch as the latter meaning was adopted by the War Department, upon the advice of Judge-Advocate-General Holt, before the revision of the statutes, and has since been acquiesced in and followed in several instances, I advise adherence to that construction.

The papers transmitted are herewith returned.

Very respectfully,

CHAS. DEVENS.

H. T. CROSBY, Esq., *Chief Clerk,*

Acting for the Secretary of War, in his absence.

DAM AT LAKE WINNIBIGOSHISH.

By the act of June 14, 1880, chap. 211, an appropriation is made for the construction of a dam at Lake Winnibigoshish, with a *proviso* "that all injuries occasioned to individuals by overflow of their lands shall be ascertained and determined by agreement or in accordance with the laws of Minnesota, and shall not exceed in the aggregate \$5,000." The land to be overflowed, as is ascertained by actual survey, lies

Dam at Lake Winnibigoshish.

within the limits of the reservation of the Chippewa Indians, secured to that tribe by the treaty of February 22, 1855. *Held* that the said *proviso*, being in terms limited to the lands of individuals, cannot be extended to lands of the Chippewa tribe, and that Congress has not otherwise, in said act, manifested an intention to exercise the right of eminent domain in or upon lands in said Indian reservation, or to authorize the overflow of any part of that reservation, or the taking of timber or materials therefrom.

DEPARTMENT OF JUSTICE,

August 13, 1880.

SIR: Referring to the clause of the river and harbor improvement bill approved June 14, 1880, which appropriates "For the reservoirs at the headwaters of the Mississippi River, to be used in the construction of a dam at Lake Winnibigoshish, seventy-five thousand dollars: *Provided*, That all injuries occasioned to individuals by overflow of their lands shall be ascertained and determined by agreement or in accordance with the laws of Minnesota, and shall not exceed in the aggregate five thousand dollars," yours of the 22d of July states that an actual survey ascertains that all of the land to be overflowed will be within the limits of the reservation secured to the Chippewa Indians by treaty of February 22, 1855, and thereupon you submit for my consideration the following questions:

First. Can the United States, in its own right, appropriate such of the lands as will be overflowed? and if not—

Second. Would the right, if acquired, to cut the timber on the lands to be overflowed within the limits of the reservation, to be paid for in the same way as other materials, and the right to overflow the land in perpetuum, to be paid for out of the \$5,000 provided for injuries, &c., satisfy the requirements of the act?

Third. What person or persons are authorized to treat with the War Department or its agents for the transfer of the land in question?

1. The Indians usually have only the right to occupy their lands, while the complete ultimate title and the exclusive right of acquiring possession is held by the National Government independently of the will of the Indian tribes. (*Johnson v. McIntosh*, 8 Wheat., 603; *Cherokee Nation v. Georgia*, 5 Pet., 17.)

Dam at Lake Winnibigoshish.

Whether the Chippewas in Minnesota have only this general right, or whether under the treaty aforesaid they have a more valuable title to these lands, in either case the United States unquestionably has the *power*, and Congress must judge of the emergency in which it is rightfully exercised, to take any lands owned or occupied by Indians, as well as that of white or other citizens.

The real question in the present case, as it seems to me, is whether or not Congress, by the above quoted language of the act of June 14, 1880, has evinced an intention to exercise this right of eminent domain or of supreme sovereignty as to lands lying within the Chippewa Indian Reservation. As to the lands of private or individual owners outside the reservation, this purpose is made sufficiently apparent by the proviso. The terms of this proviso, however, cannot be extended so as to embrace these Chippewa *tribal* lands, because expressly confined to the lands of individuals, and because there would be no propriety in following the laws of Minnesota relating to the sale or appropriation of property, as to this particularly situated territory of exclusively federal jurisdiction.

It may be further observed that while the proviso limits the amount to be paid as compensation for injuries by overflow to the lands of individuals to \$5,000, the communication of the Engineer-in-Chief, to which you invite my attention, states that the damage to the Chippewa lands by such overflow will exceed the whole sum appropriated for the construction of the dam. This tends to show that there was no design to take these lands by overflow, making just compensation.

Is it probable that Congress intended to take them *without* awarding any compensation or providing any means by which its proper measure should be ascertained? To me this seems very improbable. I cannot think Congress would make it a condition precedent to entering upon this work, or to expending this appropriation upon it, that the injuries occasioned to individuals, as definitely ascertained, should not exceed \$5,000, and yet leave the Chippewa damages indefinite, unlimited, without any methods of present or future appraisement. Nor can I believe that Congress designed to take them without ever making compensation therefor. Such a

Dam at Lake Winnibigeshish.

course would not be in accordance with that heretofore uniformly pursued in dealing with the Indians, nor at all consonant with the plainest principles of justice. True, the Indians ordinarily have no title to the soil in fee, though they do sometimes acquire it by contract with the United States; but the Supreme Court of the United States has twice within the last ten years declared the right of the Indians to their occupancy is as sacred as that of the United States to the fee. (*United States v. Cook*, 19 Wall., 593, top; *Beecher v. Wetherby*, 95 U. S., 526, top.)

In delivering the opinion in this last-cited case, Field, J., observes: "that occupancy could only be interfered with or determined by the United States. It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race." (95 U. S., 525.) From a clause simply appropriating a specific sum to construct a dam, we cannot properly infer a purpose to dispossess the Indians without any provision for their compensation. They have not been so dealt with heretofore. In the opinion of Marshall, C. J., in the case of the *Cherokee Nation v. Georgia*, *ubi sup.*, it is observed that "the Indians are acknowledged to have an unquestionable and heretofore unquestioned right to the lands they occupy until that right shall be extinguished by a *voluntary* cession to our Government." (5 Pet. 17.) There has been no such extinguishment of their right to the lands to be flowed by the erection of the dam in question. Out of the lands ceded by these Indians to the United States, by treaty of February 22, 1855 (10 Stats., 1165, Art. 1), the land in question was expressly reserved by the second article. (10 Stats., 1166, Art. II.)

Prior to the approval of the act of March 3, 1871, chap. 120, sec. 1 (16 Stats., 566), such voluntary cessions to extinguish the Indian title have been made by means of treaties, for reasons indicated in the decisions of the Supreme Court in the before-cited and many other cases.

This act of March 3, 1871, is now found in the Revised Statutes: "SEC. 2079. No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power, with whom

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the United States may contract by treaty, but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March third, eighteen hundred and seventy-one, shall be hereby invalidated or impaired."

This act, then, did not affect the rights of these Chippewas. Since its passage, when it has become desirable to extinguish the Indians' right of occupancy, Congress has by preliminary enactments authorized agreements, conditional upon its approval, to be made with the Indians, and subsequently ratified them if satisfied with their terms. One example of this course will be cited. The act of June 20, 1878, chap. 359 (20 Stats., 232), authorized a commission to arrange with the Utes for their removal in Colorado; the act approved June 15, 1880, accepts and ratifies the agreement thus made.

In view of the whole history of our dealings with the Indians, early and recent, of their anomalous and dependent situation, I cannot deduce a purpose upon the part of Congress to effect a total change of policy and to invalidate the treaty securing to these Chippewas the peaceful occupancy of the lands in question, as an inference (and by no means an obvious or necessary one, but rather the contrary) from the language of a single clause of a voluminous appropriation act allowing a given sum to be expended in the erection of a reservoir dam at a designated point.

While, then, I think the United States has the power, in the construction of this dam, to take by overflow necessary lands and to appropriate materials thereon for its erection, I also think that Congress has not, in the legislation submitted to my examination, exercised this power so far as the Chippewa Indian Reservation is concerned, and that there is no authority given to overflow any part of this reservation or to take timber or materials therefrom. If this is a fatal hindrance to the prosecution of the improvement, further Congressional action must be invoked.

2. In reply to your second question, though the conclusion above stated may preclude the necessity of any reply, I would say that the Indians do not own the timber, have no right to cut it themselves except for the sole purpose of improving the land, and cannot sell it to anybody else. This is expressly determined in *United States v. Cook*, 19 Wall., 591. Having only the right to occupy the land, timbered or other, they

Louisville and Portland Canal.

should only be compensated for the injury done to this occupation, and not for the value of the timber, &c. But Congress has not provided for the cutting of this timber any more than for the overflow of the soil. Taking land by overflowing it is an exercise of the right of eminent domain. (*Pumpelly v. Green Bay Company*, 13 Wall., 166.) The act of June 14, 1880, not giving the authority to the officers of the United States so to take land within the Indian reservation, cannot be held to have conferred upon the Indians a power to sell it, or make any agreement about it which they did not before possess.

3. The foregoing observations give this answer to your third inquiry: that there is no person authorized to treat, either on the part of the United States or of the Indians, for the transfer of the lands in question.

The papers which accompanied your letter are herewith returned.

Very respectfully,
HON. ALEXANDER RAMSEY,

Secretary of War.

CHAS. DEVENS.

LOUISVILLE AND PORTLAND CANAL.

The act of May 18, 1880, chap. 95, which abolished all tolls at the Louisville and Portland Canal after July 1, 1880, authorized the Secretary of War "to draw his warrant from time to time upon the Secretary of the Treasury to pay the actual expenses of operating and keeping said canal in repair." *Held* that, by fair implication from the provision quoted, the Secretary of the Treasury is thereby as fully authorized to pay the warrants drawn by the Secretary of War as if it had expressly declared that they should be paid out of any moneys in the Treasury not otherwise appropriated.

That act compared with the provision in the act of June 14, 1880, chap. 211, directing the application of the money collected theretofore as tolls on said canal, or which may thereafter "be so collected prior to the passage of an act to make said canal free to the public," &c., and the purpose of each enactment explained.

DEPARTMENT OF JUSTICE,

August 14, 1880.

SIR: Yours of the 5th instant asks if the act of May 18, 1880, "to abolish all tolls at the Louisville and Portland Canal," makes any appropriation of money for the operation and repair of that work.

Louisville and Portland Canal.

The act provides "That after the 1st day of July, 1880, no tolls shall be charged or collected at the Louisville and Portland Canal, but the Secretary of War shall be authorized to draw his warrant from time to time upon the Secretary of the Treasury to pay the actual expenses of operating and keeping said canal in repair."

In the river and harbor act approved June 14, 1880, this paragraph was inserted: "The balance in hand, after payment of any existing liability, collected heretofore as tolls on the Louisville and Portland Canal, or which may hereafter be so collected prior to the passage of an act to make said canal free to the public, is hereby authorized to be expended for its improvement: *Provided*, Such expenditure shall not exceed \$60,000."

Your query is whether the first act of itself appropriated money; and whether (if so) it is affected by the above-quoted clause of the later act.

The first act, in authorizing the Secretary of War to draw warrants from time to time upon the Secretary of the Treasury for the purpose indicated, empowered the latter to pay the warrants so drawn, by legal and almost necessary inference, as fully as if it had been expressly stated that they should be paid out of any moneys in the Treasury not otherwise appropriated.

On comparing the two acts, it will be seen that the act of May 18, 1880, did not become operative so as to make the canal free until the 1st of July thereafter; and until that time tolls were to be charged and collected. The act of June 14, 1880, was apparently intended to provide for the disposition of the funds which would be collected before the canal became actually free, by ordering them to be expended in the improvement of the canal, provided such expenditure should not exceed \$60,000. After the canal became free, upon the 1st day of July, 1880, the Secretary of War was empowered to pay the actual expenses of operating and keeping it in repair by warrant upon the Treasury, which would operate, as before suggested, on any moneys not otherwise appropriated.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. ALEXANDER RAMSEY,
Secretary of War.

Mississippi River Commission—Mileage.

MISSISSIPPI RIVER COMMISSION—MILEAGE.

The members of the Mississippi River Commission (created by the act of June 23, 1879, chap. 43), who are appointed from the Engineer Corps of the Army, are entitled to mileage, at the rate of 8 cents per mile, for all travel required of them by that commission pertinent to the objects for which it was constituted. Travel so required is travel under orders, within the meaning of section 2 of the act of July 24, 1876, chap. 226.

Such mileage should be paid out of the appropriation made in said act of June 23, 1879, for "necessary expenses."

DEPARTMENT OF JUSTICE,

August 25, 1880.

SIR: In reply to yours of the 11th instant, asking, in reference to such members of the *Mississippi River Commission* (created by the act of 1879, chap. 43, June 23) as are appointed from the Engineer Corps of the Army, *what traveling allowances or mileage* can be paid, and *by whom* said allowances shall be paid, I submit the following conclusions:

The act above cited provides (sec. 2) that "the commissioners appointed from the Engineer Corps of the Army and the Coast and Geodetic Survey shall *receive no other pay or compensation than is now allowed them by law.*" At that time (as still) mileage at the rate of 8 cents per mile was allowed by law, "*when any officer travels under orders,*" with certain exceptions not material here. (Act of 1876, chap. 226, § 2; 19 Stats., 100.)

Upon consideration of the language of the constituting act, especially such as requires certain qualities in the persons to be appointed, I am of opinion that it was the intention of Congress that the members of the Mississippi River Commission should *personally* inspect the various localities upon that river at which surveys, &c., were then going on or in the view of the commission ought to be undertaken, whenever such personal inspection might be required by that body; meaning by *required*, action analogous to the *specific order* by which the War Department properly interprets the act of 1876. Travel so required is *travel under orders* within the meaning of the act of 1876 above quoted. The commission had power to compel the engineer officers belonging thereto, *as officers of*

 Reissue of Patent.

the Army, to undertake any travel which it might designate, pertinent to the objects for which it was constituted.

Concluding, therefore, that the officers appointed upon the Mississippi River Commission from the Engineer Department of the Army are entitled to mileage for all travel ordered by that commission, I will add briefly that I concur with your view, that such mileage should be paid out of the special appropriation made in the constituting act for "necessary expenses."

"Travel" is an item the amount of which so specially depends upon the particular duty to which an officer is assigned that the propriety of making a distinction between the source from which he is to derive *pay*, in the stricter sense of the word, and that from which he is to receive such *compensation*, is apparent. The decision of the Second Comptroller to this effect, quoted by you, seems applicable to all cases in which Congress has not manifested a different intention, and, therefore, to the present.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Acting Attorney-General.

The SECRETARY OF WAR.

 REISSUE OF PATENT.

Where an application for the reissue of a patent in two or more divisions is made, whilst the original patent is in existence, the Commissioner of Patents has power to issue a patent for one or more of the divisions of the reissue application, and subsequently to issue a patent for the remaining divisions, if it be deemed that otherwise the applicant is entitled thereto. Until such application is ended in all its divisions, the vitality of the original patent continues, so far as required to support that portion of the application which remains undecided.

DEPARTMENT OF JUSTICE,
August 31, 1880.

SIR: Yours of the 26th instant, with papers inclosed, states the case of James Greaves as the basis for a question of law in regard to reissues of patents. That case is, that a patent having been issued to Greaves on the 20th of February, 1877, an application was made by him on the 15th of March after-

Reissue of Patent.

wards for its reissue *in two divisions*, A and B. Thereupon, upon examination the subject-matter of A was found to conflict with a like subject-matter in a pending application by another party, and on the 10th of July, 1877, an interference proceeding was accordingly instituted. Upon this state of facts Greaves asks that a patent for division B be issued *now*, without prejudice to his right hereafter to a patent for division A, in case the interference shall be disposed of in his favor. This presents for decision the general question, can the Commissioner of Patents issue a patent for one or more of the divisions of a reissue application, and subsequently issue a patent to the applicant for the remaining divisions if it be held that otherwise he is entitled to them?

In his letter to you, made part of your communication, the learned Commissioner of Patents states that previously to 1869 it had been the common practice of the office to allow the several divisions of an application for a reissue to issue separately, and he adds that he is not aware that the legality of this action has ever been questioned in the courts.

In 1869, Commissioner Fisher held, in the case of Whiteley, that such separate issue could not be allowed, and the same rule was, about the same time, laid down by Chief Justice Cartter, of the supreme court of the District of Columbia. In these cases, as I understand from Mr. Marble's letter, just cited, the reissue was in the first instance undivided, and only after a grant had been made in that style was a division called for. In the present case both of the divisions of the reissue application were filed at the same time.

However, after these decisions, it was laid down as a rule of practice in the Patent Office that "all the divisions of a reissue will issue simultaneously. If there be controversy as to one, the others will be withheld from issue until the controversy is ended." (Rule 66.)

This rule was in force at the time of the application for reissue under consideration. Its terms are broad enough to cover applications made at the same time, as well as those made under the circumstances of Whiteley's case. But *now* a new rule has been adopted, having been in force, as I find from the copy of the rules transmitted by you, at least since December 7, 1879. It provides that, "unless it shall be other-

Reissue of Patent.

wise ordered by the Commissioner, all the divisions shall issue simultaneously; if there be controversy as to one, the others will be withheld from issue until the controversy is ended, unless he shall otherwise order." (Rule 88.)

The former rule went beyond the principle laid down by Chief Justice Cartter, quoted in the papers. The reason assigned by him for refusing to issue a subsequent division was that with the issue of the preceding division the original patent had necessarily expired, and that such original being *functus officio*, it could no longer form a basis for reissues. This principle covers the case of applications for a *division* made after the reissue has been granted, as it is only by such *grant*, and *not* by the mere *application*, that the original patent is surrendered and loses vitality.

The good sense of the maxim, *Pendente lite nihil innovetur*, is as applicable to proceedings in the Patent Office as elsewhere. Until an application is ended in all its divisions, the vitality of the original patent continues, so far as required to support that portion of the application which remains undecided.

Since the repeal of the above rules suggested by the decisions in Whiteley's case, &c., it therefore appears that there has been nothing to prevent the Commissioner of Patents from issuing the several divisions of a reissue in case the applications therefor have been made whilst the original patent is in existence.

In addition to this, the rule of December 1, 1879, expressly confers the power, and governs the case in question, although adopted whilst the application was pending.

I therefore answer the question put by you as to the power of the Commissioner over successive reissues of divisions of patents, in the affirmative.

Very respectfully, your obedient servant,

S. F. PHILLIPS,

Acting Attorney-General.

The SECRETARY OF THE INTERIOR.

Exemption from Enrollment and License.

EXEMPTION FROM ENROLLMENT AND LICENSE.

The provision in the act of June 30, 1879, chap. 54, which exempts from enrollment, registration, or license "any flat-boat, barge, or like craft for the carriage of freight, not propelled by sail or by internal motive power of its own, on the rivers or lakes of the United States," has reference solely to vessels of that description built within the United States and owned by citizens thereof. It does not extend to foreign-built craft.

Held, accordingly, that barges of the above description of twenty tons burden or upward, built in Canada but owned by American citizens, are liable to the payment of tonnage as prescribed by section 4371 Rev. Stat., when found trading between district and district.

DEPARTMENT OF JUSTICE,
September 16, 1880.

SIR: Yours of the 14th instant asks the following questions:

"Whether the last clause of the act relating to vessels not propelled by sail or internal motive power of their own, and for other purposes, approved June 30, 1879, should be so construed as to apply to barges or vessels of Canadian build not propelled by sail or internal motive power of their own when owned by American citizens, so that such barges or vessels when so owned and found trading between district and district will not be liable to the payment of tonnage tax prescribed by section 4371 of the Revised Statutes."

The clause referred to by you is one which exempts all flat-boats, barges, or like craft for the carriage of freight, not propelled by sail or by internal motive power of its own, on the rivers or lakes of the United States, from enrollment, registration, or license.

Upon its face the law applies only to craft navigating rivers or lakes which belong exclusively to the United States.

A question is made whether such craft if of 20 tons burden or over must also be built within the United States, as required by sections 4132 and 4312 of the Revised Statutes. The clause in question has been thought to include craft of that burden even where foreign built, if imported and owned by American citizens.

The provision certainly has no such effect directly, for vessels so built were not required or allowed to be enrolled pre-

Exemption from Enrollment and License.

viously. In relieving from enrollment, therefore, it operates upon craft "built within the United States" only—as much as if that term had been expressly inserted. Nor in my opinion does it have such an effect indirectly. The argument that it does, proceeds apparently upon the ground that inasmuch as the statutes which hitherto have prevented foreign-built craft from engaging in the coast trade of the United States have effected that purpose by confining the privilege to vessels registered or enrolled, such registration and enrollment being possible for *United States built* vessels only, therefore when registration or enrollment is no longer required as to craft of a certain burden, such craft may engage in coasting, no matter whether *United States built* or not.

If the granting of the privilege of coasting to United States built craft were a mere *incident* to the laws for registration and enrollment, intended for the better enforcement of that system, the above argument would have great weight. But this is not so. That privilege is the expression of a substantive policy, and although it has found a convenient method of enforcement in the laws for registration and enrollment, it is in point of reason and foundation entirely independent of them. Reference to the act of 1789, chap. 11, will show that registration and enrollment have from the first been intended as a means of enforcing privileges bestowed upon *United States built* vessels; and so the frame of law has stood ever since. To conclude that a repeal of these acts works a *pro tanto* repeal of the privilege is in effect to reverse the old maxim and to hold that the principal *follows* the accessory. Meanwhile the only proper conclusion seems to be that the privilege must thereafter be enforced by whatever other means the laws afford.

I therefore, upon the whole, conclude that the clause in question is limited to craft navigating lakes or rivers belonging solely to the United States, and that with regard to these it does not dispense with the requirement that they be built within the United States (section 4132), and I answer the question submitted by you in the negative. Although the vessels mentioned in section 4371 need no longer be enrolled and licensed, or licensed only, they must still be such as by

Case of William H. Dinsmore.

the former law might have been enrolled and licensed, or licensed.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

CASE OF WILLIAM H. DINSMORE.

On the 28th of May, 1880, D., being then a deputy surveyor of customs at the port of San Francisco (appointed with the approbation of the Secretary of the Treasury), whose salary, as fixed by law (sections 2721 and 2746 Rev. Stat.), exceeded \$3,000 per annum, was authorized by the collector of that port, under section 2629 Rev. Stat., to perform the duties and exercise the functions of surveyor at the same port (there being a vacancy in this office, caused by the death of the late incumbent), and did perform such duties and exercise such powers until July 23, 1880, when the vacancy was filled by appointment by the President. *Held* (1) that the office of deputy surveyor held by D. did not become vacant upon his designation to act and by his acting as surveyor; (2) that he is not entitled to the compensation provided for the office of surveyor for the period during which he performed the duties and exercised the powers of that office. The allowance to him of any compensation beyond that attached to the office of deputy surveyor is forbidden by section 1763 Rev. Stat.

DEPARTMENT OF JUSTICE,
September 28, 1880.

SIR: In the letter of the 31st ultimo addressed to me by Hon. H. F. French, Acting Secretary, these facts are stated:

On the 28th of May last, William H. Dinsmore, then deputy surveyor of customs at San Francisco, was, under section 2629 of the Revised Statutes, authorized by the collector of that port to perform the duties and exercise the powers of surveyor, there being a vacancy in that office, caused by the death of the late incumbent. Mr. Dinsmore served in the capacity indicated until the 23d of July (not quite two months), when the office was filled by appointment in the usual way.

By statute, the compensation of the deputy surveyor at San Francisco is more than \$3,000 per annum. (See secs. 2721, 2746 Rev. Stat.)

Upon this case I am requested to answer these inquiries, to wit, whether the office Dinsmore held as deputy surveyor

Case of William H. Dinsmore.

was vacated by his designation to act as surveyor, and whether during the time he performed the duties and exercised the powers of surveyor he is entitled to the compensation allowed to that officer, or only to that of deputy surveyor?

In an opinion rendered to your Department on the 9th of August last, I said that "there are two classes of deputy collectors, deputy surveyors and deputy naval officers; the one with fixed and definite duties, which continue the same whether the chief officer is present or absent, and whose offices are permanent in their character; the other special, and intended simply to provide for the performance of the duties of such officer in case of inability on his part."

I learn upon inquiry at the Treasury that Mr. Dinsmore's appointment was confirmed by the Secretary, and that he received the salary fixed by Congress for the deputy surveyor of San Francisco. He was therefore an officer of the former class. He continued in the office after the death of the surveyor, and was deputy surveyor at the time he was designated to act as surveyor. This designation did not make him surveyor. Section 2629 Revised Statutes does not empower the collector of the district to fill that office, but only to depute some fit person to exercise its functions temporarily, just as by section 2632 Revised Statutes the surveyor himself, in certain contingencies, is authorized to depute some person to exercise and perform his functions, powers, and duties.

Mr. Dinsmore did not, therefore, cease to be deputy surveyor, but, being accounted a fit person, was authorized by the collector of the district to act in place of surveyor. His office of deputy surveyor was not vacated, and his salary as such officer being \$2,500 and upwards, it follows that by section 1763 Revised Statutes he cannot receive the compensation of surveyor, but only that attached to the office of deputy surveyor.

Very respectfully, your obedient servant,

CHAS. DEVENS.

HON. JOHN SHERMAN,

Secretary of the Treasury.

Case of John B. Burt.

CASE OF JOHN B. BURT.

In April, 1863, during a recess of the Senate, B. was temporarily appointed a major and aide-de-camp in the Army. His appointment expired by limitation on July 4, 1864, the end of the next session of the Senate following the appointment; but he was not *officially notified* of that fact until January 7, 1865. Under an order of the Secretary of War authorizing pay until official notification, he drew pay as major, &c., until December 31, 1864. He now applies for pay from January 1 to January 7, 1865, inclusive. *Held* (1) that B's. commission expired by operation of law on July 4, 1864, of which he was bound to take notice, and that thereafter he became a private citizen; (2) that the services subsequently rendered by him were merely voluntary, and did not create a legal right to pay; (3) that unless his right to pay has since been recognized by legislation, he is now a debtor to the United States for the money which he subsequently received.

DEPARTMENT OF JUSTICE,

September 29, 1880.

SIR: Yours of the 27th instant states the case of John B. Burt, who was appointed major and aide-de-camp to General Couch, April 25, 1863, during a recess of the Senate, his appointment expiring by limitation on the 4th of July, 1864, the termination of the next session of the Senate. (Const., Art. 2, sec. 2, chap. 3.) Major Burt, however, "was not officially notified of this fact until January, 1865," and under an order of the Secretary of War he drew pay as major, &c., until December 31, 1864, such order authorizing pay until the period of *official notification*, &c., viz, January 7, 1865. Recently he has applied for pay from January 1 to January 7, 1865, and thereupon the following questions have occurred in the office of the Second Comptroller of the Treasury, at whose instance they are now transmitted by you to the Attorney-General:

1st. Whether an officer of the Army holding a commission which expired by limitation on the 4th day of July, 1864, by reason of non-confirmation by the Senate, can legally be paid for the period of service actually performed between that date and the date of the order discharging him, or the day when he received notice of said expiration of appointment by limitation as aforesaid?

2d. If not, should the amount of the pay drawn by the said Burt for the period from July 5 to December 31, 1864, be charged against him and set off against any amount which may

TRESPASS ON INDIAN LANDS.

be found to be due him upon any other account, or otherwise collected?

Upon consideration, the former of these questions should be answered in the negative; and as a matter of law, which of course is the only way in which it is expected that I should treat it, the second question is to be answered in the affirmative.

Major Burt's commission expired by operation of law, and of this he was as much bound to take notice as any other officer under the Government. Allowing, perhaps, in analogy to English cases of offices expiring upon demise of the Crown, some short period for notice of the adjournment of the Senate to become known in different parts of the country, it is the duty of every one—even of third persons, much more of the official himself—to take notice of that event and of its legal consequences.

The case is very different from that of one officer being removed by the mere effect of the appointment of a successor. In that case some notification to the old officer is required. This was settled in 1801, in *Bowerbank v. Morris* (Wall., 118), where the principle governing the present case is also adverted to. (See 6 Opin., 87.)

It follows that Major Burt became a private citizen (so far as depended upon the appointment now under consideration) immediately after the 4th of July, 1864. Consequently the services afterwards rendered by him were merely voluntary, and did not create a legal right to pay. The conclusion in law is, that unless some subsequent legislation have recognized his right to pay, he is now a debtor to the United States for all money which he subsequently received.

Very respectfully, your obedient servant,

S. F. PHILLIPS,

Acting Attorney-General.

The SECRETARY OF WAR.

TRESPASS ON INDIAN LANDS.

Seemle that where any stock of horses, mules, or cattle are driven or conveyed so near to Indian lands that from the nature and habit of the animals they will probably go upon such lands, especially where the circumstances show an intent on the part of the person so driving or

Trespass on Indian Lands.

conveying to have them go there, if the cattle should be found upon the lands without the consent of the tribe, such person would be liable to the penalty imposed by section 2117 Rev. Stat. To incur that penalty, it is not necessary that the stock be actually driven upon the Indian lands; it is sufficient if they are so driven as to "range and feed" thereon.

DEPARTMENT OF JUSTICE,

October 6, 1880.

SIR: I have the honor to reply to your letter of the 1st instant, as follows:

Where stock of horses, mules, or cattle are found ranging and feeding upon uninclosed lands belonging to any Indians or Indian tribe, without the consent of such Indians or Indian tribe, but not *driven or otherwise conveyed thereon by any person*, section 2117 Revised Statutes does not, in my opinion, provide a remedy for the case.

The words "drive or otherwise convey," employed in the statutes, imply the active agency of some person in getting the cattle on to the reservation. If the owners or the persons in whose immediate charge cattle are turn them out upon their own uninclosed lands, or on Government lands, and without the guiding or impelling act of any person they stray upon Indian lands or upon an Indian reservation, the case is not within the statute, and I do not find any provision in the Revised Statutes which is applicable to such a case.

If, however, stock is driven or conveyed to the vicinity of or so near to Indian lands that from the nature and habit of the animals they will probably get upon such lands, and especially if the circumstances show an intent or willingness that they should so trespass, the persons so driving or conveying would, in my judgment, be liable to the penalty if the cattle should be found upon lands subject to the interdict. The statute does not require that stock should be actually driven upon the lands, but *so as to range and feed* upon them.

In the case stated by the agent, I would advise that an action for the penalty be instituted.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. A. BELL,

Acting Secretary of the Interior.

Compromise.

COMPROMISE.

A customs officer having power to seize property claimed as forfeited for violation of the customs laws, who in the performance of his duty actually makes a seizure in order to enforce the claim of the Government to the property seized, is an "agent having charge of" the claim within the meaning of section 3469 Rev. Stat. In such case, upon a report from him recommending that the claim be compromised, the Solicitor of the Treasury would be authorized under that section to make a recommendation to the Secretary of the Treasury concerning the same matter.

DEPARTMENT OF JUSTICE,

October 13, 1880.

SIR: In reply to your inquiry of September 7, 1880, I would say:

If Mr. Bartlett were merely an agent for the purpose of obtaining information and reporting it to the Treasury Department, I should be of opinion that he would not be such an agent as is contemplated by section 3469 Revised Statutes, and that you would not be authorized to base a recommendation to the Secretary of the Treasury upon his report.

An examination of the facts stated in your letter, as well as those shown by the papers which accompany it, shows that Mr. Bartlett was actually an officer of the revenue, and that as such officer he had a right to seize, and did seize, the property which it is now proposed to release by compromise, for violation of the revenue laws. He was, therefore, an agent of the Government, charged with the collection of a claim which the United States had by reason of such violation.

It may well be doubted whether the original intention of the act by which the recommendation of "a district attorney, or any special attorney or agent having charge of any claim in favor of the United States," was not designed to confine the recommendation to agents of the character of attorney or counsel, although the use of the word "agent" shows that it was intended to extend to persons beyond professional counsel only.

Were this an original question, I might perhaps be inclined to concur with you that the agent must be of the class which I have thus described. It seems, however, on examination of the papers transmitted by you, that, although no such thing has occurred during your incumbency of the office, it has been

Arrest of Indian Agent under State Process.

not unfrequent to act upon recommendations of revenue officers, whose duty it was to collect a claim in the same manner as Mr. Bartlett did.

I do not consider this construction so clearly wrong that it would be advisable now to depart from the practice I have adverted to, as it has apparently been followed for several years. The inquiry does not present itself as it would were it made entirely *de novo*. While, therefore, it would not seem advisable to act upon the report of a mere agent to collect information, I should say that, if a proper case were made, you might act upon the report of a revenue officer who, as an agent of the Government, had rightfully taken charge of the claim with a view to enforce the rights of the United States.

Very respectfully,

CHAS. DEVENS.

Hon. KENNETH RAYNER,
Solicitor of the Treasury.

ARREST OF INDIAN AGENT UNDER STATE PROCESS.

Where process was issued by a court of the State of Colorado for the arrest of an Indian agent who was charged with the commission of a crime against the laws of the State: *Advised* that he (being within the territorial limits and jurisdiction of the State, although upon an Indian reservation) is subject to the process of the State, and that he cannot be sustained in resisting the same.

DEPARTMENT OF JUSTICE,

October 19, 1880.

SIR: In regard to your inquiry of the 18th instant, I reply at once, in view of the importance of immediate decision.

I think that Special Agent Berry and his subordinates cannot be sustained in resisting the process of the State of Colorado, even although they are upon a United States reservation. There was no reservation of jurisdiction to the United States over any lands included within the territorial limits of said State, and, for that reason, I think that citizens of the United States are necessarily subject to its process.

I do not understand that any attempt is made to serve process upon any Indians in the reservation. If such should be the case, different considerations might arise.

Atlantic and Pacific Railroad Company Land-Grant.

In this view, of course the military would not be justified in maintaining a resistance to the arrest by Special Agent Berry and his associates.

I do not intend by these suggestions to limit in any way the right of the military, upon proper direction from the agent, to remove intruders from the reservation, or to do those acts necessary to prevent a conflict between the whites and the Indian tribe.

Very respectfully, your obedient servant,

CHAS. DEVENS.

H. T. CROSBY,

Chief Clerk and Acting Secretary of War.

ATLANTIC AND PACIFIC RAILROAD COMPANY LAND-GRANT.

The act of July 27, 1866, chap. 278, provided (in section 3) "that there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, &c., for the purpose of aiding in the construction of said railroad, &c., every alternate section of public land, not mineral, designated by odd numbers," to the amount of ten and twenty alternate sections per mile as therein set forth, "whenever, on the line thereof, the United States have full title, not reserved, sold, granted, &c., at the time the line of said road is designated by a plat thereof filed in" the General Land Office. Section 8 declared the grant to be "upon and subject to the following conditions, namely, that the said company shall (*inter alia*) complete not less than fifty miles per year after the second year (*i. e.*, from the date of the act), and shall construct, equip, furnish, and complete the main line of the whole road by July 4, 1878"; and by section 9 the grant was declared to be "upon the further condition that if the said company make any breach of the conditions hereof, and allow the same to continue for upwards of one year, then, in such case, at any time hereafter, the United States may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road." Section 4 provided that on completion of twenty-five consecutive miles of any portion of the road the President should appoint three commissioners to examine the same, and upon their report, on oath, that the section of twenty-five miles has been completed as required by the act, patents for the granted lands coterminous therewith are to be issued. Prior to 1871 the company constructed its road from Springfield, Mo., to the western boundary of that State; and this portion of the road was examined in conformity to section 4 of said act, and accepted, and patents for the coterminous granted lands issued. A small portion of the road was also constructed in the Indian Territory. But during the period from the year 1871

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down to August, 1880, no part of the road was constructed. A section of twenty-five miles of the road west from Albuquerque, N. Mex., having since been constructed, the company now makes application for the appointment of three commissioners to examine and report upon the same, under said section 4.

Held (1) that the grant made by said act to the said company is a grant *in presenti* (which acquired precision when the plat of the line of its road was filed as required by the statute); (2) that the conditions in section 8 of the act are conditions subsequent, and that the grant has not been forfeited by the failure of the company to perform the same, or any of them, no action to enforce a forfeiture by reason of such default having been taken by authority of Congress; (3) that the company has still a right to proceed with the construction of the road, and, until in some way authorized by Congress advantage is taken of the breach of the conditions, it is the duty of the Executive Department of the Government to give the company the benefit of the grant; (4) that the application of the company for the appointment of commissioners to examine the section of road constructed west of Albuquerque should be granted, and, if the road shall be found to be completed in all respects as required by said act, it should be accepted, and patents for lands coterminous therewith be issued.

DEPARTMENT OF JUSTICE,

October 26, 1880.

SIR: Your letter of the 15th instant presents for my consideration the application of the Atlantic and Pacific Railroad Company for the appointment of three commissioners to examine a section of twenty-five miles of its road west from Albuquerque, N. Mex., under section 4 of the act of Congress of July 27, 1866.

The Atlantic and Pacific Railroad Company was created by, and organized under, the act of Congress above mentioned, and was granted the right of way, and the public lands of the United States within certain defined limits, from Springfield, Mo., through the Indian Territory and New Mexico, to the Pacific coast.

Before 1871 it appears that the company constructed its road from Springfield to the western boundary line of the State of Missouri, and this portion of the road was duly accepted by the President, and patents for the land issued. This action was in accordance with the provision of section 4 of the granting act, which provides that when the company shall have twenty-five consecutive miles of any portion of said

Atlantic and Pacific Railroad Company Land-Grant.

railroad ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same; and if it shall appear that twenty-five consecutive miles of road have been completed in all respects as required by the act, the commissioners shall so report to the President of the United States, and patents to lands, as provided for by the third section of the act, shall be issued to the company.

The company next completed thirty-four miles in the Indian Territory, prior to 1871; but because the United States had not extinguished the Indian title, no steps were taken for the issuance of patents along the road in that Territory.

From the early part of the year 1871 down to August or September of the present year, no section or portion of the road was constructed by the company; in fact, no work of any kind or description was done by the company on the road.

Section 8 of the act makes it a condition of each and every grant, right, and privilege given to the company that the company "shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than fifty miles per year after the second year; and shall construct, equip, furnish, and complete the main line of the whole road by July 4, 1878."

The company has not conformed to this condition, as it appears that for six years prior to July 4, 1878, no road was constructed; and, in addition, that for two years subsequent to that date no portion of the road was constructed.

The ninth section of the act recites that the conditional grants were made and accepted upon the further condition that "if the company make any breach of the conditions and allow the same to continue for upwards of one year, then, in such case, at any time hereafter, the United States may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road."

By section 20 Congress has retained the right to add to, alter, amend, or repeal this act, having due regard for the rights of said railroad company.

Having in view the provisions and conditions of the granting act, and the failure on the part of the railroad company

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to perform the conditions prescribed, in the manner recited, you request my opinion upon the following question:

"Is it within the power and the duty of the Executive to appoint commissioners to examine the section of road submitted by the Atlantic and Pacific Railroad Company, to accept the same if completed in all respects required by the act of July 27, 1866, and to cause patents to be issued to said company for lands situated opposite to, and coterminus with, the section of road if completed?"

As I think the grant to this railroad must be treated as a present grant, to be made afterwards definite, as from time to time the various portions of the road are completed, the only inquiry would seem to be whether or not the conditions upon which the company received the grant are in their nature conditions precedent or subsequent. If conditions precedent, the failure to perform such conditions would deprive the road of its right to make application for the benefits of the act, if after such conditions were violated it proceeded to build portions of the road. If conditions subsequent, then it would be necessary for the United States to take advantage of such conditions by acting under the ninth section of the act, and proceeding itself to do acts and things which might be safe or necessary to insure a speedy completion of the road, or by declaring a forfeiture of the grant by legislative action or by providing for enforcing the same by a judicial proceeding. If the United States were disposed to revest in itself, or to enforce a forfeiture of the lands granted, it would be necessary to take some action indicative of that intention.

The case of *Shulenberg v. Harriman* is apparently decisive of the present inquiry. That was the case of a grant of lands to the State of Wisconsin to aid in the construction of a certain railroad within that State by the act of June 3, 1856. The language of the first section of that act was, "that there be, and hereby is, granted to the State of Wisconsin" the lands specified. Similar language is found in the third section of the act of July 27, 1866: "That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company," &c., &c. In that case the grant was made upon a condition that if the road be not completed within ten years "no further sales shall be made, and the lands unsold shall revert to the

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United States." The road had not been completed within the time required for its construction, which had not been extended, and Congress had passed no act, nor provided for any judicial proceedings, to enforce any forfeiture of the grant for failure to construct the road within the period prescribed. Upon this state of facts it was held that the grants to the State of Wisconsin were grants *in presenti*, which acquired precision as the route of the road became fixed by its location, and that the lands had not reverted to the United States, although the road was not constructed within the period prescribed, no action having been taken, either by legislation or judicial proceedings, to enforce a forfeiture of the grant. (21 Wall., 44.)

The conditions in the present case must be held, in view of this authority, to be conditions subsequent. Apparently, they are much more strongly so than in the case referred to. The section 9, in which they are found, distinctly contemplates that the United States will do some act, and may do certain acts, upon the breach of the conditions.

I am, therefore, of opinion that the grant to the railroad has not been forfeited by its failure to build its road within the time named in the act, no action, by reason of its failure to perform the conditions, having been taken by authority of Congress. It having, then, a present grant, even if it be treated as one liable to forfeiture, it has still a right to proceed to construct the road, and, until in some form advantage shall be taken of the breach of the conditions, it would be the duty of the Executive Department to give it the benefit of the grant.

I am also of opinion, therefore, that it would be within the power and duty of the Executive to appoint commissioners to examine the section of road submitted by the Atlantic and Pacific Railroad Company, to accept the same if completed in all respects as required by the act of July 27, 1866, and to cause patents to be issued to said company for lands situated opposite to and coterminous with the section of road if completed.

I have the honor, in this connection, to refer to the opinion delivered to your Department by me of the date of November 29, 1879 (upon which I understand the Department has acted),

Commutation of Quarters while on Leave of Absence.

in which the case of *Schulenberg v. Harriman*, *supra*, was considered.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. CARL SCHURZ,

Secretary of the Interior.

COMMUTATION OF QUARTERS WHILE ON LEAVE OF ABSENCE.

Where an officer of the Army, to whom leave of absence "without deduction of pay or allowance" has been granted under the act of July 29, 1876, chap. 239, is at the time he takes his leave entitled to an allowance of commutation for quarters under section 9 of the act of June 18, 1878, chap. 263, such allowance is, by force of the former act, continued to him whilst he is absent on leave for a period not exceeding that for which the leave was granted thereunder. Opinion of January 16, 1879 (see *post*, p. 619), explained.

DEPARTMENT OF JUSTICE,

November 15, 1880.

SIR: I have considered the following question, which was submitted to me in a letter from Mr. H. T. Crosby, chief clerk of your Department, dated the 30th ultimo, purporting to have been written for and in the absence of the Secretary of War, namely:

"Whether an officer in receipt of commutation for quarters under section 9, act of June 18, 1878 (20 Stat., 151), is entitled to a continuation of that commutation during the time that he may be absent from duty under the 'cumulative leave' acts of May 8, 1874 (18 Stat., 43), and July 29, 1876 (19 Stat., 102)."

In a former opinion of this Department, dated January 16, 1879, it was held that the act of July 29, 1876, cited above (which is amendatory of the act of May 8, 1874, also above cited), did not authorize commutation for quarters to officers on leave, but that it did continue to such officers *quarters in kind*. The particular inquiry with reference to which that ruling was given contained no citation of the act of June 18, 1878; nor was that act at all considered in connection with such inquiry, which was dealt with as only calling for an examination of the law as it stood on and after the date of

Naval Court-Martial—Jurisdiction.

the act of July 29, 1876, and before the modification introduced by the act of June 18, 1878.

Under section 24 of the act of July 15, 1870, which governed as to allowances to officers when the act of 1876 was enacted, allowances for quarters were authorized to be made *in kind only*; and consequently the last mentioned act, in the then existing state of the law, could not operate upon allowances for quarters other than those in kind. But by the act of June 18, 1878, the law was so modified as to authorize *commutation* for quarters to be allowed to officers in the cases there provided. The allowance of commutation for quarters thus authorized, in my opinion, comes within the operation of the act of 1876. This act declares that "all *officers on duty* shall be allowed, in the discretion of the Secretary of War, sixty days' leave of absence *without deduction of pay or allowance*: provided that the same be taken once in two years," &c. Where any such officer, to whom leave of absence "without deduction of pay or allowance" has been granted, is at the time he takes his leave entitled to an allowance of commutation for quarters, this allowance must be deemed to be continued to him, by force of that provision, whilst he is on leave of absence, though for a period not exceeding that for which the leave was granted thereunder.

The question submitted is, accordingly, answered by me in the affirmative.

I am, sir, very respectfully,

CHAS. DEVENS.

Hon. ALEXANDER RAMSEY,
Secretary of War.

NAVAL COURT-MARTIAL—JURISDICTION.

Where an assault was committed on board a steamer belonging to the Navy (the vessel being at the time under way in the Thames River, opposite the city of New London, Conn.) by a coal-heaver in the naval service upon a second-class fireman in the same service, from the effects of which the latter subsequently died: *Held* that a naval general court-martial can, under article 22 of section 1624 Rev. Stat., take jurisdiction of the offense as manslaughter.

That article is not intended to confer upon a court-martial general crimi-

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nal jurisdiction, but only jurisdiction over those offenses (not specified in the preceding articles of said section) which are injurious to the order and discipline of the Navy, the jurisdiction being given for the purpose of preserving that order and discipline.

DEPARTMENT OF JUSTICE,

November 15, 1880.

SIR: The letter of the Acting Secretary of the Navy, of the 29th ultimo, informs me that one William Brown, a coal-heaver in the Navy, committed an assault upon one John Kennedy, a second-class fireman in the Navy, on board the U. S. S. Minnesota, in the Thames River, opposite the city of New London, Conn., on the 10th day of May last, when that vessel was under way, *en route* to New York, and that the injuries inflicted by Brown upon Kennedy in this assault were so severe as to require the removal of the latter to the Naval Hospital, New York, for treatment, the day following the assault, where he died of fractura and resulting pneumonia, as represented by the certificate of death, a copy of which the Acting Secretary incloses.

The matter was brought to the notice of the city attorney, New London, with a view to the trial of Brown by the civil authorities of Connecticut, who replied: "It is considered best that Brown should be dealt with by the authorities of the United States."

As this offense was committed by a person engaged in the service upon another person also engaged in the service, on board a vessel of the Navy, and affects directly the discipline of the service, the letter inquires whether said offense may be taken cognizance of by a general court-martial, under article 22, section 1624 of the Revised Statutes, as manslaughter, in violation of that article.

The article from which the present article is derived is first found in the act "for the government of the Navy of the United States, approved March 2, 1799 (1 Stat., 709), and is in the following form :

"ART. 46. All faults, disorders, and misdemeanors which shall be committed on board any ship belonging to the United States, and which are not herein mentioned, shall be punished according to the laws and customs in such cases at sea."

Naval Court-Martial—Jurisdiction.

The next statement is in the act of April 23, 1800 (2 Stat., 45):

“ART. XXXII. All crimes committed by persons belonging to the Navy, which are not specified in the foregoing articles, shall be punished according to the laws and customs in such cases at sea.”

Article 8 of the act of July 17, 1862 (12 Stat., 600), is as follows:

“All offenses committed by persons belonging to the Navy, which are not specified in the foregoing articles, shall be punished as a court-martial shall direct; but in no case shall punishment by flogging be inflicted, nor shall any court-martial adjudge punishment by flogging.”

The present form of article 22, section 1624 Revised Statutes, is the same as that of the last mentioned article, except that it omits the last clause in regard to flogging, that subject being elsewhere dealt with.

The use of the words “all faults, disorders, and misdemeanors” in the first form would seem to limit it to offenses of a minor grade, such as would be accurately expressed by those three words.

The use of the words “all crimes,” &c., in the second form would extend it beyond mere minor offenses, and the change of the word “crimes” into the more general word “offenses” (which is the word found in the existing article) would indicate that a general word was used for the purpose of including all that might be embraced by the terms “faults,” “disorders,” “misdemeanors,” or “crimes.” This article cannot be interpreted as intending to give to a court-martial general criminal jurisdiction, but only jurisdiction over those offenses not specified by name, which are injurious to the order and discipline of the Navy, and this jurisdiction is given for the purpose of preserving that order and discipline.

Even, therefore, if the authorities of Connecticut had seen fit to try this man for manslaughter, which they might probably have done, it would not have ousted the court-martial of jurisdiction over the same offense so far as it affected the order and discipline of the ship. The offense in the one case, punished by the civil authorities, would be an offense against

Transportation of Army Supplies.

the public peace; in the other it would be an offense against the order and discipline of the Navy.

It requires no argument to show that an assault of a character so serious as to result in the death of the person assaulted, who was also in the naval service, is an offense against the order and discipline of the Navy, especially when among the enumerated cases is found the offense of "assault and battery."

I am, therefore, of opinion that the court-martial may properly take cognizance of this offense under the article in question, and that it may inflict such punishment as is proper for an offense so prejudicial to the order and discipline of a ship-of-war.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. R. W. THOMPSON,
Secretary of the Navy.

TRANSPORTATION OF ARMY SUPPLIES.

The Union Pacific Railroad Company cannot require that flour, in order to be transported over its road for the United States, shall be packed in barrels, and refuse to transport it if packed in sacks.

Whether the Kansas Pacific Railway Company can decline to transport over its road, for the United States, flour in sacks at ordinary freight rates, or require the same to be transported at owner's risk when the Government pays only the lowest rate therefor, considered.

DEPARTMENT OF JUSTICE,

December 3, 1880.

SIR: The following questions are presented for my consideration by yours of April 19, 1880, supplemented by documents and letters of July 1 and September 29.

"1. Is the Union Pacific Railroad Company authorized to refuse to transport for the United States *flour in sacks*, the sacks being composed of stout gunny and properly secured and the flour properly packed therein? In other words, is said company legally entitled to require that flour transported over its road for the United States shall be packed in *barrels*?

Transportation of Army Supplies.

"2. Can the Kansas Pacific Railway Company refuse to transport over its road, for the United States, flour in sacks, at the lowest rate charged by the company for ordinary freight? Or is the company entitled to require that if the United States pays only the lowest rate for such freight, the same shall be transported at the owner's risk?"

Answer 1st. The Union Pacific Railroad Company, as a common carrier, is bound to carry all freight offered for transportation over its line, upon the price of carriage being paid or secured. It has no right to refuse to carry flour in sacks as mentioned.

Answer 2d. It is somewhat difficult to answer the second question categorically, owing to its ambiguity of statement, especially as to the meaning of the expression "ordinary freight."

The general obligation of a common carrier was declared by the Supreme Court of the United States in the case of the *New Jersey Steam Navigation Company v. Merchants' Bank* (6 Howard, 382), to bind him "to receive and carry *all* goods offered for transportation, *subject to all the responsibilities* incident to his employment." For the discharge of this duty he is entitled to a *reasonable* compensation. He cannot relieve himself of the obligation by any general notice, or other *ex parte* act; but by *special contract* as to any particular package, or with a shipper, he *may* limit his common-law liability, but not so as to exonerate himself from the consequences of his own negligence (same case). The shipper may decline to enter into any special contract, and insist upon his common-law rights. (*Ib.*)

It is difficult to see how any claim can be made by the company to charge more per pound upon the flour in sacks than that packed in barrels, in view of the evidence forwarded to me with the papers.

By this, it appears that at the principal points of shipment, such as Chicago, railroads accept the shipment of flour in sacks upon the same terms as in barrels. This is, apparently, upon the ground that a certain rate is charged upon flour, and that no discrimination is made by reason of the mode in which it is packed.

Without discussing the evidence, however, in this matter,

Case of Lieutenant-Colonel Saxton.

it may be said that the rule of the common law for every carrier is that his charge must be reasonable; and the statute itself, in the present case, seems to have made the matter of the charges of the railroad extremely definite, by enacting that such railroad shall carry "at fair and reasonable rates of compensation, not to exceed the rates paid by private parties for the same kind of service."

The United States being by far the largest customer of the railroad, it may well be considered fair and reasonable that its freight should be carried at lower rates than that of private parties. I cannot give any more explicit answer to your second inquiry.

The papers transmitted by you are herewith returned.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. ALEXANDER RAMSEY,
Secretary of War.

CASE OF LIEUTENANT-COLONEL SAXTON.

S., an officer in the Quartermaster's Department, standing number four in the grade of lieutenant-colonel, claims that he was overslaughed by the promotion, in 1866, of the three officers who stand above him in the same grade, under an erroneous execution of the act of July 23, 1866, chap. 299 (whereby certain original vacancies in the grades of major, lieutenant-colonel, and colonel, created by that act, were filled by *selection*, instead of by promotion according to seniority), and he asks that the error be now rectified by the President by appointing him to fill the next vacancy occurring in the grade of colonel in the same corps, over the three officers referred to. *Advised* that (upon considerations stated in the opinion) the President should treat the commissions issued to these officers by his predecessor as conclusive of their right to the rank conferred thereby; that, while those commissions stand, he should have regard to them in making promotions by seniority in said corps; and that, if S. has sustained a wrong in this matter, Congress alone can remedy it.

DEPARTMENT OF JUSTICE,
December 9, 1880.

SIR: The letter of Lieutenant-Colonel Saxton, addressed to Hon. George W. McCrary, late Secretary of War, complains that, having held the commission of captain and assistant quartermaster in the Army, and his name appearing

Registration of Trade-Marks.

REGISTRATION OF TRADE MARKS.

The provisions of the act of July 8, 1870, chap. 230 (embodied in section 4937 Rev. Stat.), in regard to trade-marks, having been declared unconstitutional by the United States Supreme Court, it is no longer the duty of the officer charged therewith to execute them. Accordingly, it is recommended that the practice of registering trade-marks at the Patent Office (which was allowed to be done by parties desiring it since the ruling of the Supreme Court above referred to) be discontinued.

DEPARTMENT OF JUSTICE,
December 10, 1880.

SIR: Your letter of the 6th instant requests my opinion upon the question whether the provisions of the act of July 8, 1870 (embodied in section 4937, Rev. Stat.), should be still executed by the Patent Office.

In the "trade-mark cases" (*United States v. Steffens*, *United States v. Whittemore*, *United States v. Johnson*, 100 U. S. Reps., p. 82) it was decided by the Supreme Court that the legislation of Congress in regard to trade-marks (which includes the act of July 8, 1870, and the act August 14, 1876, 19 Stat., 141) was void for want of constitutional authority. Since this decision, it appears to have been the practice of the Department of the Interior still to allow persons desirous of registering trade-marks so to do, although the officer charged with such registration has fully informed parties so applying of the decision. This has been done for the purpose of allowing parties to save any contingent rights which they might have, and to obtain the benefit of a public declaration of their claim to the trade-mark assumed by them. To this course it would seem, at first sight, there could be no objection; but the letter of Mr. Blackwell, accompanying your communication, presents the inquiry whether as between him and other parties it was competent for the Commissioner of Patents (with whom the registration of trade-marks is) to investigate the right of particular persons to the certificates which they seek (which certificates are to the effect that such persons have registered certain trade-marks), and to decide interferences between individuals in such cases.

If all that was to be done would necessarily be terminated by simply allowing parties to register their trade-marks, they

Loss of Date and Suspension in the Navy.

taking their own risk as to whether the registration was or was not of any value, the objection to continuing registration by the Commissioner of Patents might not be serious. But it is obvious that if this registration is permitted at all, the Commissioner must necessarily entertain jurisdiction to determine who is entitled to such registration, to declare interferences, and to decide questions arising under them. This he could have no authority to do in view of the decision referred to. The act having been declared unconstitutional, it is impossible to provide legal and constitutional machinery for its execution. The jurisdiction obtained by the consent of one party, or even that of both, voluntarily appearing before the Commissioner, would not be jurisdiction such as a public officer should entertain.

Upon the whole matter, therefore, I would recommend that the practice of registering trade-marks be hereafter discontinued at the Patent Office.

Very respectfully, your obedient servant,

CHAS. DEVENS.

HON. CARL SCHURZ,

Secretary of the Interior.

LOSS OF DATE AND SUSPENSION IN THE NAVY.

The words in section 1505 Rev. Stat. namely, "shall be suspended from promotion for one year, with corresponding loss of date," do not mean that the loss of date is to be *contemporaneous* with the term of suspension, but only that it shall agree therewith in point of duration.

Accordingly, where A., a lieutenant in the Navy, being the senior officer of his grade, became entitled to examination for promotion to fill a vacancy in the next higher grade (lieutenant-commander), which occurred January 22, 1880, and afterwards, upon examination, failed to pass, and the findings of the examining boards were approved February 6, 1880, by the President, who directed that he "be suspended from promotion for one year, with corresponding loss of date": Held that the loss of date of A. is one year, to be reckoned from the occurrence of the vacancy, January 22, 1880, the date from which he would have taken rank as lieutenant-commander had he been found qualified for promotion, and that his year of suspension is to be reckoned from the approval of the President of the findings of the examining boards, February 6, 1880.

In the above case, as A., by reason of his suspension, is ineligible for promotion during the whole of the year commencing February 6, 1880,

Loss of Date and Suspension in the Navy.

no vacancy should be kept open for him until February 6, 1881. Such vacancies as happen to exist during that period, the officers who are then eligible for promotion are entitled to fill. But as his loss of date is only to be one year from January 22, 1880, if, on his second examination, he shall be found qualified to fill a vacancy in the next higher grade which occurred after the period of his suspension, he will be entitled, upon promotion thereto, to take rank in such grade as of the date of January 22, 1881. He will not, however, be entitled to the pay of the higher grade from the ranking date in his commission.

DEPARTMENT OF JUSTICE,
December 10, 1880.

SIR: Your letter of the 29th ultimo informs me that Lieut. Edward L. Amory, U. S. N., was suspended from promotion February 8, 1880, under the provisions of section 1505 Revised Statutes, having been found professionally disqualified. Lieut. Commander Allan D. Brown, U. S. N., was promoted to the grade of commander to fill a vacancy, January 22, 1880, at which time Lieutenant Amory, the senior officer of his grade, became entitled to examination for promotion to fill a vacancy in the next higher grade, caused by the promotion of Lieutenant-Commander Brown.

In obedience to an order dated January 22, 1880, Lieutenant Amory appeared on the 27th of that month before the examining boards for the examinations preliminary to promotion required by sections 1493 and 1496, Revised Statutes.

The board of medical examiners having pronounced Lieutenant Amory physically qualified to perform all his duties at sea, he was then examined by the examining board as to his mental, moral, and professional fitness for promotion, which board reported its findings as follows: "We hereby certify that Lieut. E. L. Amory has the mental and moral qualifications to perform efficiently all the duties, both at sea and on shore, of the next higher grade, but he has not the professional qualification required, and we do not therefore recommend him for promotion."

The proceedings and findings of the examining board in this case were presented to the President for his action, who indorsed his orders thereon as follows:

"EXECUTIVE MANSION, *February 6, 1880.*

"The findings and recommendations of the boards in this case are approved, and, in conformity with section 1505 of

Loss of Date and Suspension in the Navy.

the Revised Statutes, Lieut. E. L. Amory, U. S. N., will be suspended from promotion for one year, with corresponding loss of date.

“R. B. HAYES.”

Lieutenant Amory was then informed by letter from the Navy Department of February 9, 1880, of the findings of the board and the President's action thereon.

Lieut. John S. Newell, U. S. N., who was next in rank to Lieutenant Amory, was then examined, found qualified, and promoted, February 9, 1880, to the grade of lieutenant-commander, with rank as such from January 22, 1880, to fill the vacancy caused by the promotion of Lieutenant-Commander Brown.

Six vacancies have occurred in the grade of lieutenant-commander since the promotion of Mr. Newell, four of which have been filled by promotion of lieutenants, according to seniority. Orders have been issued for the examination of the senior lieutenant, who, if found qualified, will be promoted to fill one of the two existing vacancies in the grade of lieutenant-commander.

In view of the fact that the period of suspension from promotion of Lieutenant Amory will soon expire, and he will be re-examined, and that the number of officers in the grade of lieutenant-commander is limited by law (section 1363 Rev. Stat.), you request my opinion upon the following questions:

1. Should a vacancy in the grade of lieutenant-commander be held open for the promotion of Lieutenant Amory, if found qualified upon re-examination?

2. Does the loss of date by Lieutenant Amory commence from January 22, 1880, the date from which he would have taken rank as lieutenant-commander had he been found qualified for promotion, or from February 6, 1880, the date of the approval of the findings of the examining board in his case by the President?

In the event of an answer to your first question in the negative, you inquire—

3. Could Lieutenant Amory be promoted to the next higher grade, if found qualified upon re-examination, at the expiration of his period of suspension, or should his promotion be

Loss of Date and Suspension in the Navy.

then postponed until the happening of a vacancy in the grade of lieutenant-commander?

Section 1505 Revised Statutes is as follows:

"Any officer of the Navy on the active list below the grade of commander who, upon examination for promotion, is not found professionally qualified, shall be suspended from promotion for one year, with corresponding loss of date, when he shall be re-examined, and in case of his failure upon such re-examination he shall be dropped from the service."

Before proceeding to answer your inquiries, it seems to me important to consider whether the provisions in section 1505 for suspension from promotion and for loss of date contemplate that the term of the one is to be *contemporaneous* with the period of the other.

The difficulties presented by this question may be thus briefly stated: If it be held that the loss of date of Lieutenant Amory is to commence from the time when the President approved the findings of the examining board, he may practically lose much more time than a year in date, as under some circumstances there may be considerable delay in the adjudication of his case. But little delay occurred in the present case, yet enough obviously to make it an important question. On the other hand, if the suspension of Lieutenant Amory is to date from the time of the occurrence of the original vacancy—namely, January 22, 1880—it is easy to conceive of cases in which the officer suspended would not have the time which it was the intention of the statute to allow him in order to repair the deficiencies in his professional qualifications. If, upon the second examination, he fails, the officer is to be dropped from the roll of the Navy; and in making provision for suspension and for re-examination it was clearly intended that a considerable time should elapse between the commencement of the date of the suspension and the time when he could be ordered for re-examination.

In view of these considerations, I am of opinion that the words in the statute, "shall be suspended from promotion for one year, with corresponding loss of date," &c., do not mean that the loss of date shall necessarily be contemporaneous with the period of suspension, but that the loss of date shall correspond in length of time with the period of suspension.

Loss of Date and Suspension in the Navy.

In this view, it seems to me, justice will be done to the officer and to the evident intention of the statute that he shall be retained in the service when his deficiency has been one that may be reasonably expected to be soon repaired. The year of loss of date by Lieutenant Amory will commence from January 22, 1880; but the period during which he will be suspended from promotion will commence on February 6, 1880. He will thus be only punished with a loss of date of one year in extent. The period of suspension will extend over an equal time, during which he will have an opportunity to repair the deficiencies that have been found to exist.

It is necessary, in this connection, to consider what will be the operation of this construction in regard to future events. For the period of the year of suspension, Lieutenant Amory is out of the service so far as promotion is concerned. He cannot be promoted until February 6, 1881. When promoted, the date from which (assuming that he shall then have passed his examination) he is to take rank will be correctly stated by causing his rank to commence as of the date of January 22, 1881. As he is ineligible for promotion during the whole year commencing February 6, 1880, no vacancies should be kept open for him until that time arrives. Such vacancies as occur, the officers who are then eligible are entitled to fill; and it is the obvious intention of Congress that such positions shall be filled, as they are created, not for the benefit of officers, but for the needs of the public service. As his loss of date is only to be from January 22, 1880, when he is able thereafter to obtain promotion his rank should be expressed as above stated in his commission. Undoubtedly it is true that vacancies may not occur until many months after February 6, 1881; but of this Lieutenant Amory would have no just ground of complaint. The only period of suspension that the law has designated is terminated on February 6, 1881. If he is unable to be promoted at that time, or immediately thereafter, it is only the common case of an officer eligible for promotion but for whom no vacancy is ready. It would be impossible for his benefit to extend the number of lieutenant-commanders beyond that designated by the statute. In stating that he would be entitled to have rank when he shall finally have been promoted, as of the date of January 22, 1881, I do not

Fort Porter Military Reservation.

intend to be understood as intimating that he would be entitled to the pay of the higher grade from the ranking date in his commission. His case would not be that of the officer provided for by section 1562 Revised Statutes.

To answer your questions, then, directly, I reply to your first and third inquiries that no vacancy in the grade of lieutenant-commander should be held open for the promotion of Lieutenant Amory which may occur previously to the expiration of the year of his suspension, and that he cannot be promoted into the next higher grade, if found qualified upon re-examination, at the expiration of his period of suspension, until a vacancy shall have occurred in that grade. His promotion is necessarily postponed until the occurrence of a vacancy in that grade by the law which limits the number of lieutenant-commanders.

In answer to your second inquiry, I reply that the loss of date by Lieutenant Amory commences from January 22, 1880, the date from which he would have taken rank as lieutenant-commander, and, as before stated, that the period of his suspension commences on the date of the approval of the findings of the examining board by the President.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. R. W. THOMPSON,
Secretary of the Navy.

FORT PORTER MILITARY RESERVATION.

Where certain land (now constituting part of the Fort Porter military reservation at Buffalo, N. Y.) was granted to the United States under an act of the legislature of New York, dated February 28, 1842, "for military purposes, reserving a free and uninterrupted use and control in the canal commissioners of all that may be necessary for canal and harbor purposes": *Held* that the right of the State, under the reservation in the grant, is limited by the purposes of the grant, and that the State is not entitled to use the land for any purpose, if thereby its use for the military purposes of the United States will be interfered with; yet that the State has a right to use so much of the land as may be necessary for canal and harbor purposes, where such use does not interfere with its use for the military purposes of the Government. Accordingly, *held* that the Secretary of War may permit the State of

Fort Porter Military Reservation.

New York to use so much of the premises for canal purposes as will not interfere with the use thereof for military purposes.

DEPARTMENT OF JUSTICE,

December 14, 1880.

SIR: A letter from H. T. Crosby, esq., chief clerk of your Department, of the 13th of October last (written for the Secretary of War, in his absence), inclosed certain correspondence relative to "the needs of the State of New York to certain land included within the Fort Porter military reservation, which land was granted to the United States by the State of New York, with certain reservations contained in the grant," and requested my opinion "as to the authority of the Secretary of War to permit, under the considerations aforesaid, the State of New York to use so much of said land as will not interfere with its use for military purposes." Having considered the subject of this request, I have now the honor to reply:

By an act of the legislature of the State of New York, dated February 28, 1842 (Rev. Stat. of N. Y., 4th ed., p. 98), the commissioners of the land office of that State were authorized to cede to the United States the land referred to "for military purposes; reserving a free and uninterrupted use and control in the canal commissioners of all that may be necessary for canal and harbor purposes." The same act also provided for a cession of jurisdiction over the same land.

Such title as the United States have to the premises is derived under that act.

In a letter to the Secretary of War, dated August 10, 1880, the superintendent of public works of the State of New York, upon whom the duties of the office of canal commissioner (which was abolished in 1876) are devolved, states that "the interest of this State requires that said land, or a portion of it, should now be occupied by this State for canal purposes." And it is understood that a right to occupy the land for those purposes is claimed for the State by virtue of the reservation in the act aforesaid. It is important, therefore, to determine what is the extent of this right.

Under the grant from the State, the United States now hold the land for a specific purpose, namely, "for military purposes"; and the reservation in favor of the State (viz, of "a

 INCREASE OF PENSIONS.

free and uninterrupted use and control * * * of all that may be necessary for canal and harbor purposes") can be deemed valid *only so far as it is not repugnant to the grant*. Hence the right of the State to occupy and use the premises for canal or harbor purposes must be regarded as limited, or restricted, by the purposes of the grant—that is to say, by the use of the premises for the military purposes of the Government; and, consequently, where the use and occupation by the State would defeat or interfere with the purposes of the grant, the right of the State thereto does not exist. Whether, in any case, the use of the land by the State would be an interference with its use for military purposes, is a question for the military authorities to decide.

While, therefore, the State has no right whatever to use the land referred to for any purpose, if thereby the use of the land for the military purposes of the Government will be interfered with; yet, on the other hand, the State would seem to be entitled to use so much of the land as may be necessary for canal and harbor purposes, where this does not interfere with its use for military purposes.

I am, accordingly, of opinion that the Secretary of War has authority to permit the State of New York to use so much of the premises for canal purposes as will not interfere with the use thereof for military purposes.

I am, sir, very respectfully,

CHAS. DEVENS.

Hon. ALEXANDER RAMSEY,
Secretary of War.

 INCREASE OF PENSIONS.

The act of June 16, 1880, chap. 236, which provides for an increase of pension for certain pensioners "now receiving a pension of \$50 per month" under the act of June 18, 1874, chap. 299, being in terms limited to those who *at the time of its enactment* were receiving a pension of \$50 a month under the act of 1874, its benefits cannot be extended to those who may *thereafter* become entitled to receive a pension of the same amount under the act of 1874.

DEPARTMENT OF JUSTICE,
December 15, 1880.

SIR: Your letter of the 3d instant requests my opinion as to the construction which should be placed upon the act of

Increase of Pensions.

Congress approved June 16, 1880, entitled "An act to increase the pensions of certain pensioned soldiers and sailors, who are utterly helpless from injuries received or disease contracted while in the United States service."

This act provides "that all soldiers and sailors who are now receiving a pension of \$50 per month under the provisions of an act entitled 'An act to increase the pensions of soldiers and sailors who have been totally disabled,' approved June 18, 1874, shall receive in lieu of all pensions now paid them by the Government of the United States, and there shall be paid them in the same manner as pensions are now paid to such persons, the sum of \$72 per month."

Your letter further informs me that there are persons who, on June 16, 1880, were pensioned at a lower rate than \$50 per month, whose disability has since that date increased to such a degree as to entitle them to the benefits of the act of June 18, 1874, and that there are pensioners who will hereafter, by increase of disability, become entitled to the benefits of said act.

Upon this statement of facts and law, you inquire whether the act of June 16, 1880, is applicable to such cases, so as to increase the pensions to the rate of \$72 per month from the date at which the parties became, or shall become, entitled to the benefits of the act of June 18, 1874.

The act of June 16, 1880, is so clear and explicit that it is not susceptible of any construction which would extend its benefits beyond the persons distinctly described therein. These are the persons "who are now (that is, at the date of the act) receiving a pension of \$50 per month," &c. It may be impossible for us to see any reason why Congress might not with propriety extend the bounty contemplated by the act of June 16, 1880, to all who should thereafter become entitled to the benefits of the act of June 18, 1874; but when an act has in distinct terms limited its bounty to those who at the date of its passage were receiving, under said act of 1874, a pension of \$50 per month, it would not be possible, by construction, to extend its benefits to another class who might thereafter come into existence, even if it were not possible to see why that class was not equally deserving.

I am, therefore, of opinion that, the language of the act of

Appointments ad interim.

June 16, 1880, being explicit and clear, construction cannot extend its benefits so as to increase the pensions of those who might thereafter become entitled to receive, under the act of June 18, 1874, the sum of \$50 per month, so that they should thereby receive the \$72 a month contemplated by the later act.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. CARL SCHURZ,

Secretary of the Interior.

APPOINTMENTS AD INTERIM.

Under sections 177, 178, 179, and 180 Rev. Stat., the President has power to temporarily fill (by an appointment *ad interim*, as there prescribed) a vacancy occasioned by the death or resignation of the head of a Department, or of the chief of a bureau therein, for a period of ten days only. When the vacancy is thus temporarily filled once for that period, the power conferred by the statute is exhausted. It is not competent to the President to appoint either the same or another officer to thereafter perform the duties of the vacant office for an additional period of ten days.

DEPARTMENT OF JUSTICE,

December 31, 1880.

SIR: Your letter of December 30, 1880, informing me that the period of ten days for which Hon. Alexander Ramsey, Secretary of War, was designated to act as Secretary of the Navy, under the provisions of sections 177-180 Revised Statutes, expired the day before, and inquiring of me whether any person after such expiration could properly sign requisitions as Acting Secretary of the Navy for payments on account of the Navy, is received.

In answer, I would say that, in my opinion, the vacancy in the office of Secretary of the Navy created by the resignation of Hon. R. W. Thompson cannot be filled by designation of the President beyond the period of ten days. This power of the President is a statutory power, and we must look to the statute for its definition. An examination of the statutes which precede the statute of 1868 embodied in section 180 Revised Statutes satisfactorily shows that the period for which the vacancy can be filled by designation is limited to ten days.

Appointments ad interim.

It would not, therefore, be in the power of the President, after such ten days, to designate another officer, or the same officer, to act for an additional period of ten days. The statutory power being exhausted, the President is remitted to his constitutional power of appointment. No appointment has been made, and there is, and can be, no person authorized by designation to sign requisitions upon the Treasury Department on account of Navy payments as Acting Secretary of the Navy.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. JOHN SHERMAN,
Secretary of the Treasury.

NOTE.—In connection with the foregoing, compare opinion of March 8, 1878, in 15 Opin., 457, 458.

OPINIONS

OF

OFFICERS OF THE DEPARTMENT OF JUSTICE

*APPROVED BY THE ATTORNEY-GENERAL.

DISMISSED OFFICER—RIGHT TO COURT-MARTIAL.

H., a major of infantry, was dismissed from the Army, without trial by court-martial, in July, 1863, by order of the President. In April, 1878, he made application for trial by court-martial under the provisions of section 1230 Rev. Stat. *Held* that the phrase, in that section, "any officer dismissed," is prospective only in its meaning, and that H. is not entitled to a court-martial.

DEPARTMENT OF JUSTICE,
May 29, 1878.

SIR: Your note of the 17th instant, referring, by direction of the President, to the Attorney-General the application of Granville O. Haller, late major in the Seventeenth Infantry, has been received, and herewith I submit a reply.

The papers inclosed by you show that the applicant was dismissed from the Army, without trial by court-martial, by order of the President, upon the 25th of July, 1863, "for disloyal conduct and the utterance of disloyal sentiments." His *application for trial* upon such charge is dated April 4, 1878. The delay to ask for such trial during fifteen years he accounts for by the statement that he had no legal right to demand a court-martial until the enactment of the Revised

*NOTE.—Section 358 of the Revised Statutes provides as follows: "Any question of law submitted to the Attorney-General for his opinion, except questions involving a construction of the Constitution of the United States, may be by him referred to such of his subordinates as he may deem appropriate, and he may require the written opinion thereon of the officer to whom the same may be referred. If the opinion given by such officer is approved by the Attorney-General, such approval, indorsed thereon, shall give the opinion the same force and effect as belong to the opinions of the Attorney-General."

Dismissed Officer—Right to Court-Martial.

Statutes, upon section 1230 of which the present application is based; and that since such enactment he has been a resident of Washington Territory, and, until recently, ignorant of the existence of such provision.

The question asked by you is, "Whether, assuming the truth of his statement, the petitioner is entitled to a court-martial?"

The section of the Revised Statutes relied upon and quoted by Mr. Haller is as follows:

"SEC. 1230. When any officer, dismissed by order of the President, makes, in writing, an application for trial, setting forth, under oath, that he has been wrongfully dismissed, the President shall, as soon as the necessities of the service may permit, convene a court-martial, to try such officer on the charges on which he shall have been dismissed; and if a court-martial is not so convened within six months from the presentation of such application for trial, or if such court, being convened, does not award dismissal or death as the punishment of such officer, the order of dismissal by the President shall be void."

This provision is a *revisal* of that contained in the act of 1865, chapter 79, section 12 (13 Stat., 489), and differs from it the applicant contends *materially*, by omitting, before the word *dismissed*, in the first line above, the words "who may be hereafter"; *i. e.*, as is contended, by extending to *all dismissed officers* that relief which the act of 1865 had confined to *officers hereafter dismissed*.

In my view, the omission above specified is not material for the purposes suggested by the petitioner. For, although in ordinary usage the phrase "any officer *dismissed*" may be so far equivocal as to require a context to determine whether it refers to *past* or to *future* dismissals, or includes *both*, yet, when it is *legislative*, the rule is that, in the absence of a context otherwise determining, its meaning is *prospective* merely.

Not only is there in the present case no such context, but the existing presumption is strengthened by the circumstance that the provision is a part of a *revision* of the law; with regard to which the rule of interpretation is that no alteration of the previous law is to be argued from any change of phraseology that does not *clearly* convey such intent,

Treaty of Washington—Cod-liver Oil.

(Pomeroy's Sedgwick, p. 229), *i. e.*, to apply the rule to the case before us, the provision of the act of 1865 being unambiguous, its *revision* by section 1230 is not to be considered ambiguous because of the substitution of a phrase merely doubtful for one that is plain.

Therefore, referring to the terms of your question, I am of opinion that, assuming the truth of Mr. Haller's statement, he is not entitled to a court-martial.

Very respectfully, your obedient servant,

S. F. PHILLIPS,

Solicitor-General.

The SECRETARY OF WAR.

Approved :

CHAS. DEVENS.

TREATY OF WASHINGTON—COD-LIVER OIL.

The provision in Article 21 of the treaty of Washington, of May 8, 1871, that "fish-oil * * * being the produce of the fisheries of the United States, or of the Dominion of Canada, or of Prince Edward's Island, shall be admitted into each country, respectively, free of duty," does not include cod-liver oil which has been purified and refined for medicinal purposes, whether it is put up in barrels or other kind of package. Such cod-liver oil is dutiable.

DEPARTMENT OF JUSTICE,

June 5, 1878.

SIR : Yours of April 22, addressed to the Attorney-General, is as follows :

"I have the honor to invite your attention to Article 21 of the treaty of Washington, which provides that for the term of years mentioned in Article 33 of said treaty, fish-oil and fish of all kinds, except fish of the inland lakes and of the rivers falling into them, and except fish preserved in oil, being the production of the fisheries of the United States and of the Dominion of Canada, and of Prince Edward's Island, shall be admitted into each country, respectively, free of duty.

"The question has arisen whether under this article of the treaty cod liver oil imported into the United States in barrels, which has been purified and refined, and intended to be bottled and used for medicinal purposes, is included in the

Treaty of Washington—Cod-liver Oil.

exemption thereby accorded. The question has been presented both by appeal from actual assessments of a duty of 40 per cent. made at New York, such oil being classified as a medicinal preparation under schedule M of the Revised Statutes, and by Sir Edward Thornton, through the Department of State, on behalf of his Government.

"As showing the action taken by this Department, both under the reciprocity treaty of 1854 and the present treaty of Washington in this regard, I inclose a brief prepared by one of the officers of this Department.

"I will thank you for your opinion upon the question as to the right of such refined oil to free entry under the treaty of Washington."

By the *brief* referred to, it appears that under the reciprocity treaty of 1854, and after its expiration, a like provision as to fish-oil has at various times received practical construction in the Treasury Department, as follows :

I. Under date of May 5, 1856, the Secretary, having under consideration the subject *cod-liver oil*, instructed the collector at New York that if the article imported were a *medicinal preparation* it was liable to duty, but if it were *cod-liver oil of commerce not further manufactured than other fish-oils* it was within the treaty, and therefore free. This decision was modified on the 27th of June, 1857, so as to confine the liability to duty to such oil as is *put up in bottles*, labelled and intended to be used as a medicine ; and upon the 30th of that month circular instructions to that effect were issued. However, on the 10th of January, 1866, the collector at Boston was instructed that if the oil were in a refined and purified condition suitable and intended for use as a medicine, whether it were *imported in barrels or otherwise*, it was not within the treaty, but was *dutiable*. This also was the tenor of a previous decision by the Secretary, in 1865, and it was the construction prevailing when the reciprocity treaty expired.

II. In October, 1868, after the expiration of the treaty last mentioned, it was held, under the customs-duties statutes, that cod-liver oil, *if fit for medicinal use*, was liable to duty at 40 per cent. ad valorem, but if *crude*, and not so fit, then to 20 per cent. On the 19th of March, 1872, the collector at Boston was instructed that as it appeared that but a small part of

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the oil imported in barrels is used for medicine, the greater part being used by tanners and in other trades, therefore, referring to the general instructions issued as above in 1857, oil *imported in bottles* should pay duty as a medicinal preparation, but when *imported in barrels* it should pay as *fish-oil*, i. e., 20 per cent. ad valorem.

III. It was decided by the Secretary, on the 15th of November last, upon appeal from the collector at New York, that an importation of cod-liver oil *in bottles* was not free under the treaty of Washington, but that that treaty applied only to the article *commercially known as fish-oil*. On the 7th of December last, the collector at Plattsburg was instructed, reference being made at the same time to the above decisions in January, 1866, and March, 1872, that cod-liver oil in a purified or refined condition, suitable and intended for medicine, no matter in what packages imported, was not within the treaty of Washington, but was dutiable.

After giving the above facts, the brief shows that in February and March last a correspondence upon this matter took place between yourself and the Secretary of State, growing out of recent representations made to the latter by His Excellency the British Minister, to the effect that cod-liver oil when *pure*, as designated by him at one time, or *refined*, as designated at another, is thereby only the more certainly and merely *fish-oil*, and so must be within the treaty of Washington, and *free*. I observe that his excellency is represented in this connection as saying "that there are two classes of cod-liver oil; that the ordinary cod-liver oil is procured by allowing the liver to decompose in casks and the oil to run from them, while the pure oil is prepared from fresh cod liver oil by heat and compression, and that nothing is mixed with it, and that it is fish-oil pure and unadulterated; and that the latter is the oil upon which the customs authorities at New York have exacted a duty of 40 per cent. ad valorem, on the ground that it is a medicinal preparation.

Upon consideration, it seems to me that the distinction taken between such cod-liver oil as is a *medicinal preparation* and such as is the cod-liver oil *of commerce* not further manufactured than other fish-oils, being the distinction substan-

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tially taken as above in May, 1856, by the Treasury Department, but more definitely repeated by it in January, 1866, and finally adhered to in instructions given during last December, is reasonable, and ought to prevail. The question cannot turn upon the sort of package, whether wood or glass or other, in which the article is imported. The quality relied upon to establish a distinction must inhere in the oil itself.

The difference in wording upon the matter in question, between the reciprocity treaty of 1854 and the treaty of 1871, is not important. The fact, then, that such practical construction had been given to the former treaty, and substantially had been continued throughout its existence, is significant as to the intentions of the parties in repeating the provision when dealing with the same subject in 1871. Besides, the qualification "the production of the fisheries of the Dominion of Canada," &c., not only excludes the production of *other* fisheries, but suggests that the oil is to be such only as *fisheries* ordinarily produce, and so excludes such oil as has undergone further manipulation to fit it for purposes to which fishery oil cannot be applied.

The treaties of 1854 and of 1871 are in this respect essentially *commercial*, and therefore the expression under consideration should be treated as *commercial*. Accordingly, in case of an issue properly raised between an importer and the Government, the question whether an article is *fish oil* within the treaty of 1871 must ordinarily be determined by a jury. As your communication (purposely, I suppose) states no specific facts as to the refining process to which the fish oil in question has been submitted, I assume that only very general suggestions, such as are given above, are called for in reply.

Before concluding, it seems pertinent to add that the circumstance that new and improved processes for *extracting* oil have come into use at the fisheries will not exclude their product from the operation of the treaty of 1871. For instance, it seems that oil extracted from the livers of the fish, by either process mentioned as above by His Excellency the British Minister, is equally commercial fish oil.

In such case there is no *secondary manipulation* of the article; *i. e.*, no mingling of an effect of British skill in some other department of industry with an effect of the same still

Relative Rank of Assistant Surgeons.

employed in fishing, and therefore nothing to deprive the article of the favor due to it under the treaty provision in question.

Very respectfully, your obedient servant,

S. F. PHILLIPS,

Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved:

CHAS. DEVENS.

RELATIVE RANK OF ASSISTANT SURGEONS.

On the 9th of October, 1867, C. was appointed to fill an original vacancy in the grade of assistant surgeon in the Army, under the provisions of section 17 of the act of July 28, 1866, chap. 299. He accepted the appointment October 14, 1867. Having previously served as a medical officer of volunteers for more than three years, his appointment entitled him under the same provisions to the rank of captain, and he was accordingly noted as of that rank on the Army Register. *Held* that the relative rank of C. with other assistant surgeons in the medical corps must be determined by reference to the rank conferred by his appointment (which is that of *captain*) and the date thereof, and not by reference to the date of his appointment as *assistant surgeon*, irrespective of the rank conferred thereby.

DEPARTMENT OF JUSTICE,

June 6, 1878.

SIR: Yours of the 3d ultimo, addressed to the Attorney-General, presents for consideration the following case and question:

"I have the honor to request your opinion as to a question of rank, under the law, arising in the case of Dr. Archibald B. Campbell, assistant surgeon, with the rank of captain in the United States Army. This officer accepted his commission as assistant surgeon October 14, 1867, and having before served as medical officer of volunteers for more than three years, his rank as captain is noted in the Army Register as of the same date, in accordance with the provision of the act of July 28, 1866, chapter 299, section 17; 2d March, 1867, chapter 146, section 5; Revised Statutes, section 1170.

"His name, however, has heretofore been borne on the Army Register below the names of twenty-three captains and assistant surgeons, the dates of whose appointments as as-

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sistant surgeons with the rank of first lieutenant in the regular Medical Corps were prior to his appointment in the same corps as captain.

"The question which I would propound to you is whether Dr. Campbell's relative rank with other assistant surgeons in the Medical Corps, and his rank in the Army, is to be determined by the date of his appointment as captain or by the date of his appointment and commission as assistant surgeon, without reference to the grades of captain or first lieutenant attached by law to that office ?

"The accompanying papers present the grounds of Dr. Campbell's claims and the views of the Judge-Advocate-General and the Adjutant-General upon the question."

The act of 1866, cited by you, which alone it is necessary here to consider, after *increasing* the number of assistant surgeons in the Army, thus creating in that class what are called in the act "original vacancies," and after providing that officers of this class should have the rank, &c., of *lieutenants of cavalry for the first three years' service*, and of *captains of cavalry after three years' service*, enacted that "all the original vacancies in the grade of assistant surgeon shall be filled by selection by examination from among the persons who have served as staff or regimental surgeons or assistant surgeons of volunteers in the Army of the United States two years during the late war, and persons who have served as assistant surgeons three years in the volunteer service shall be eligible for promotion to the grade of captain." In other words, the act provided that all persons ordinarily belonging to the class of assistant surgeons should for three years' service rank as lieutenants, and afterwards as captains, and that competition for admission in the first instance to the vacancies thereby created should be limited to persons who had served, &c., for *two* years in the late war—persons having so served for *three* years to be eligible to promotion as captains; *i. e.*, such three years' service entitling the person, *upon successfully undergoing examination*, instanter and by mere operation of law to rank as captain. Three years' service in this class being by this act the ordinary standard of merit for the rank of captain, it proceeded to recognize three years' service in a like class during the late war as an equiva-

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lent thereof; the word "promotion" in that connection being to the same effect, and signifying a recognition of the service among the volunteers as to some extent performed in the Regular Army.

After carefully considering the papers communicated by you, I answer the question above propounded by saying that under the circumstances of Dr. Campbell's previous three years' service in the late war his relative rank as captain began at the date of his appointment and commission as assistant surgeon in the Regular Army.

Very respectfully, your obedient servant,

S. F. PHILLIPS,

Solicitor-General.

The SECRETARY OF WAR.

Approved :

CHAS. DEVENS.

TRANSPORTATION OVER LAND-GRANT ROAD.

In March, 1877, the Northern Pacific Railroad Company entered into a contract with the Quartermaster's Department to transport Army supplies, at a stated rate per 100 pounds, between certain points in the State of Minnesota, in performing which the company was obliged to transport the stores part of the way over a land-grant railroad. In the contract was a stipulation that no deduction should be made from the rate stated "on account of land grants." Held that the contract is within the act of March 3, 1875, chap. 133, and that the accounting officers of the Treasury have no authority to audit and settle a claim for transportation thereunder, but such claim is required to be settled by suit in the Court of Claims.

The prohibition in the act of 1875 is not limited to payments to the company owning the land-grant road over which the transportation was performed. It extends to payments made to any railroad company for transportation over any land-grant road of the sort specified, whether its own or another's.

The act of 1875 does not take away the authority of the accounting officers of the Treasury to audit and settle accounts for transportation arising under *bona fide* contracts made with common carriers other than railroad companies, in cases where such transportation has been partly performed over land-grant roads.

DEPARTMENT OF JUSTICE,

June 28, 1878.

SIR: Yours of the 7th instant, addressed to the Attorney-General, states the following case and questions:

"In March, 1877, the officers of the Quartermaster's Depart-

Transportation over Land-Grant Road.

ment contracted with the Northern Pacific Railroad Company for the transportation of quartermaster stores from Saint Paul, Minn., to Moorhead, in that State, at 84 cents for one hundred pounds. In carrying out this contract the company was obliged to transport the stores for about 131 miles over the Lake Superior and Mississippi Road. This is a land-grant railroad, and, as such, direct payments to the owners for the transportation of United States property appear to be forbidden by the act of March 3, 1875 (18 Stat., 453). As transportation over this road, in part, was necessary, it was stipulated in the contract between the officers of the Quartermaster's Department and the Northern Pacific Railroad Company that no deduction should be made from the rate above stated on account of land-grants.

"Accounts for this transportation, amounting to \$17,338.79, have been received at the Quartermaster-General's Office and found to be clerically correct. The Third Auditor states that if the tariff of each company is to be taken as the measure of computation, the amount due the Northern Pacific Railroad Company alone, for transportation over its own line, will strictly exceed the amount which would be due under the contract for the transportation over both roads. It would also appear that in several other cases officers of the Quartermaster's Department and of the Indian Department have contracted with common carriers to transport freight over routes that necessitated its being carried over railroads that had received land-grants; and that stipulations similar to that above mentioned have been inserted in the several contracts, and accounts for this transportation are now pending, involving the question whether they shall be paid irrespective of the land-grants to any of the roads over which the transportation extends.

"Your opinion is respectfully requested on the following points:

"1. Is the contract first above mentioned legal and valid?

"2. Is the stipulation therein on the subject of land-grant roads affected as a part of the contract?

"3. Have the Auditor and Comptroller authority to audit and settle the account first above mentioned?

"4. Can the Auditor and Comptroller settle and allow

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accounts presented by common carriers for services of the kind last mentioned?"

1. I apprehend that the first of the above questions is substantially, *whether such contract is within the act of 1875*, cited by you. If it be, as suit is required to be brought thereupon, in the course of which, of course, any question as to its validity must be decided by the court, it would be unnecessary here, for any practical question before you, to give an opinion thereupon.

The contract in question is within the act of 1875. It is a contract to pay a railroad company for transportation over a land-grant road of the sort (13 Stat., 64) mentioned in that act. The act of 1875 forbids the payment of money "to *any* railroad company for the transportation of *any* property, &c., over *any* railroad, &c., constructed" as was the one in question. This prohibition is very general. It is not limited to money for *toll*, as defined by the Supreme Court (93 U. S., 442), but includes all money for *transportation*. Nor is it limited to payments to the company which owns the road. It extends to payments made to any railroad company for transportation over any land-grant road of the sort specified, whether its own or another's. It appears, therefore, to be the policy of the legislature that this contract shall be settled only by a suit in the Court of Claims.

2. Upon consideration it seems that the clause referred to in your second question, viz, "no deduction should be made from the rate above stated on account of land-grants," is one not proper to insert. The contracts should show upon their face that such deduction *has been made* by the parties, otherwise they imply that they remain subject thereto. The clause in question (to which the principle *quæ nihil frustra*, &c., applies) signifies that but for it such deduction would be due, and therefore it suggests competency in itself to override the statute which requires such deduction. This is, of course, inadmissible.

Nevertheless, if it plainly appears from the incidents to the contract (amount of the rate, &c.) that in fixing compensation the parties did make the deduction required by law, I am of the opinion that the contract would not be illegal merely because of the unfortunate turn of the above expression, which

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in such case should be taken only to notify the disbursing officer that all proper allowances had already been made while fixing the rate.

This consideration will not (as appears above) obviate recourse to the Court of Claims; because the legislature has compelled such resort in all cases of money demanded for *transportation*; whereas the land-grant acts apply only to *toll*; that is, as already said, the legislature requires contracts for *transportation* to be settled in the Court of Claims, even where due allowance for *toll* has been made by the contractors.

3. Your third question I understand to be virtually answered above.

4. I understand the fourth question to refer to common carriers *other than railroad companies*, for the previous questions, at least as above considered, substantially cover the latter.

The act of 1875 refers to no parties excepting railroad companies. It therefore furnishes no rule of action for the cases mentioned.

Leaving that act, therefore, out of consideration, it seems to me that generally in the cases in which officers of the United States require the services of common carriers other than the railroad company over whose line the transportation is to be done, such services constitute an additional consideration of so much weight as to prevent any presumption of impropriety in the rate. For instance, if the United States have occasion for the services of an express company upon a line, part or all of which lies over a land-grant road, inasmuch as the connection and the rates as between the express company and the railroad company are fixed by general arrangement, it would probably be impracticable for the United States to obtain a deduction for toll. In such case, although the item of transportation done by the United States through the express company may go to swell the amount of toll received by the land grant railroad company, it seems that this would be a case of *remota causa*, not within the terms of exclusion of the land-grant act.

Of course this view does not protect cases of contracts with common carriers, &c., evincing intended or other manifest *evasion* of such acts.

Computation of Service for Longevity Pay, etc.

I add that the principle laid down above for cases in which the incidents show that proper allowance has, in fact, been made by the contractors for the exemption from toll in question applies to the subjects of the fourth question equally with those of the second.

Very respectfully, your obedient servant,

S. F. PHILLIPS,

Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved :

CHAS. DEVENS.

COMPUTATION OF SERVICE FOR LONGEVITY PAY, ETC.

Cadets at the Military Academy at West Point are not "enlisted men" within the meaning of section 7 of the act of June 18, 1878, chap. 263. The phrase in that section, "during the war of the rebellion," is a limitation upon the provisions thereof only with respect to officers of the Army who have served as *officers* in the volunteer forces. It does not apply to those officers of the Army who have served as *enlisted men* in either the volunteer or regular forces. Hence, in computing the service of officers of the latter description for longevity pay and retirement, service performed by them as enlisted men previously to the war of the rebellion must be taken into account.

A military post or station where there are public quarters for officers, but such quarters are insufficient for the accommodation of all the officers there, is, in regard to those officers who are necessarily excluded from the public quarters, a place where there are "no public quarters" within the meaning of the *proviso* in section 9 of said act, and commutation for quarters may be allowed to the officers thus excluded.

DEPARTMENT OF JUSTICE,

August 7, 1878.

SIR: The questions asked by you of the Attorney-General, in communications dated on the 20th and 26th ultimo, concern the construction of sections 7 and 9 of the Army appropriation act of June 18, 1878.

The former of these sections, so far as material here, provides "That all officers of the Army of the United States who have served as officers in the volunteer forces during the war of the rebellion, or as enlisted men in the Armies of the United States, regular or volunteer, shall be, and are hereby, credited with the full time they may have served as

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such officers and as such enlisted men in computing their service for longevity pay and retirement."

The questions asked in this connection are (1) whether *cadets at West Point* are to be regarded as "enlisted men"; and (2) whether service performed by enlisted men *previously to the war of the rebellion* is to be taken into account.

1. Upon consideration, it seems to me that cadets are not "enlisted men" within the section above quoted.

A perusal of other sections of the act of June 18, last, shows that Congress was at that time making special provision for the benefit of privates and non-commissioned officers who had been or might be promoted as officers. Section 2 enacts that every Official Army Register hereafter issued shall give the previous *service as a private or non-commissioned officer* of all officers promoted from the ranks, or having served in the volunteer army either as enlisted men or as officers; section 3 enacts that all vacancies in the grade of second lieutenant shall be filled by appointment from the graduates of the Military Academy, or, failing those, by promotion of meritorious non-commissioned officers of the Army, and that only after the exhaustion of the above classes shall appointments be made from civil life; and section 4 makes detailed provision for such promotions of non-commissioned officers.

It seems to me that section 7 is plainly an exhibition of the same policy. The officers spoken of in section 2 are such as have been *promoted from the ranks of the Regular Army*, or as have served *as enlisted men, or as officers in the volunteer army*; those spoken of in section 7 are such as have served *as officers in the volunteer forces, or as enlisted men in the Army, regular or volunteer*. In the former section, the two classes mentioned are arranged with reference to the branch of the service (regular or volunteer) from which they come; the two classes in the latter section are arranged with reference to their previous rank, viz, as officers, or as enlisted men.

The persons, however, who are to be registered in a particular way under section 2 are the same that are to receive a particular credit under section 7. Indeed, section 2 is preliminary to section 7, and provides the evidence needed for its ready administration. Therefore, as officers who were primarily cadets cannot be described as "promoted from the

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ranks" under section 2, it follows that such previous condition is not included under the phrase "enlisted men" in section 7.

I add that the meaning of the phrase "enlisted men," derived as above from considering different provisions in the act before us, is also that ordinarily in use. Whatever may be said as to the virtual effect of the process by which civilians become cadets, its technical specific name is not *enlistment*, but *admission*; and in the same way, after admission they are not *men*, but *cadets* of the Army.

I have in this connection read and considered the opinions referred to in the papers transmitted, viz, those to be found in 1 Opin., 276, 348 and 469; 2 Opin., 251; and 7 Opin., 323. It is true that in one instance (1 Opin., 290) Mr. Wirt, *arguendo*, calls cadets "enlisted soldiers." The conclusion to which he came, however, did not turn upon that expression, and the subsequent well-considered discussion of the topic by Mr. Cushing (7 Opin., 323), in which the view now adopted is clearly maintained, may well be characterized as making substantially an end of controversy thereupon.

2. The second question above stated presents no special difficulty. The phrase "during the war of the rebellion" is introduced as a limitation upon the clause providing for *officers*, but is omitted from that which refers to *enlisted men*.

I therefore answer this question affirmatively.

Section 9 of the act of June 18, last, enacts, "That at all posts and stations where there are public quarters belonging to the United States, officers may be furnished with quarters in kind in such public quarters, and not elsewhere," &c., "Provided, *That at places where there are no public quarters, commutation* therefor may be paid by the Pay Department to the officer entitled to the same, at a rate not exceeding," &c.

In connection with this provision, it occurs to you as a question whether at a post where there are public quarters, *insufficient, however, in quantity*, commutation may be allowed to such officers as, because of such deficiency, cannot be *furnished*.

I answer this question affirmatively; for at such stations, in regard to all officers necessarily excluded from public quar-

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ters, there are, within the meaning of the proviso, "no public quarters."

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Solicitor-General.

Hon. GEORGE W. McCRAEY,
Secretary of War.

Approved :

CHAS. DEVENS.

APPOINTMENTS IN THE MEDICAL CORPS.

C. and T., each of whom had previously served as a medical officer in the volunteer forces during the late war, were appointed to fill original vacancies in the grade of assistant surgeon in the Army, created by section 17 of the act of July 28, 1866, chap. 299, the appointment of the latter having been made in May, 1867, and that of the former in October, 1867. *Held* that neither C. nor T. is entitled (in the absence of a statutory provision authorizing it) to have his commission dated as of the date of the act creating the vacancies, viz, July 28, 1866.

DEPARTMENT OF JUSTICE,
September 27, 1878.

SIR: Yours of the 7th ultimo, addressed to the Attorney-General, is as follows :

"I have the honor to ask for your opinion upon the following questions arising upon a state of facts fully set forth in the accompanying report of the Judge-Advocate-General, under date of July 24, 1878, which I beg that you will accept as part of this communication.

"1st. Was Assistant Surgeon Archibald Campbell, upon being appointed an assistant surgeon in October, 1867, entitled to be regarded and treated as appointed to one of the original vacancies then existing, and to have his appointment and commission dated to take effect from the date of the law creating such vacancies, to wit, July 28, 1866?

"2d. Was Assistant Surgeon M. K. Taylor, who was appointed to an original vacancy, entitled to have been appointed and commissioned from the same date, July 28, 1866?

"3d. If the answer to either or both of the previous questions should be affirmative, what remedy, if any, can now be

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afforded the claimants for the erroneous dates of their commissions, and their consequent loss in rank?"

In considering the first two questions, I found that one circumstance which was to some extent material has been undetermined by the report of the Judge-Advocate-General. This circumstance is the rank borne by Doctors Taylor and Campbell while serving in the volunteer forces. The act of July 28, 1886, mentioned among volunteers only assistant surgeons as the persons from among whom the original vacancies were to be filled. It is only by the subsequent act of March 2, 1867, that surgeons of volunteers are included. The second act amends the former, but is not retrospective.

Upon application at the office of the Surgeon-General, I learn from the records that both of the gentlemen above named were surgeons in the volunteer army. It may be that this is the circumstance which prevented Dr. Taylor, although inadvertently examined and passed in December, 1866, from receiving a commission until May, 1867, and in the same way induced Dr. Campbell to decline applying for examination until a short time before September, 1867. At all events, it seems that the doctrine of relation can carry their rights back no further than the 2d of March, 1867.

However, I agree with the Judge-Advocate-General that the doctrine of relation does not apply. The statute conferred the original vacancies thereby created upon no particular persons. The selection which the statute designated as the method by which the persons to fill such vacancies were to be ascertained was necessarily (Const., Art. 2, sec. 2) an executive act. There are no words in the statute conferring a retrospective effect upon such selection, and in the absence thereof, upon general principles, it has none.

The kind of relation which takes place when a particular officer succeeds to a vacancy by ordinary promotion is plainly not in point here. The right to the vacancy in such case is specific, and in that character has at all periods of the officer's career existed in an inchoate state as a fruit of his original appointment into the Army. The examination required upon promotion in such case is a condition subsequent, operating, if at all, to defeat the specific right; while here the condition

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is precedent, and must be performed before any specific right is created.

I add in this connection—although it seems, from a suggestion made by the Judge-Advocate-General, to be unimportant, seeing that the doctrine of relation does not apply—that Dr. Campbell is to be taken as having been appointed to an original vacancy, and not to one occasioned by the resignation of O'Connor; for his claim, considering his age (forty-seven years), was only to the former appointment, and the general order (1868, p. 43) which declared that he had been appointed "*vice* O'Connor, resigned," at the same time denotes him as "captain," which he would not be unless this appointment had been to an original vacancy. In this contradictory state of the records, it is competent to show the real state of the transaction.

I therefore answer your first and second questions in the negative, and this, of course, removes the third question out of the way.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Solicitor-General.

HON. GEORGE W. MCCREARY,
Secretary of War.

Approved:

CHAS. DEVENS.

GOVERNMENT ADVERTISEMENTS.

The provisions of section 3828 Rev. Stat., forbidding the publication of advertisements "for any Executive Department of the Government, or for any bureau thereof, or for any office therewith connected," except "under written authority from the head of such Department," extend to offices connected as aforesaid, no matter where located.

DEPARTMENT OF JUSTICE,
December 16, 1878.

SIR: Yours of the 16th of August last, addressed to the Attorney-General, inquires whether section 3828 of the Revised Statutes, *which forbids advertisements, &c., "for any Executive Department of the Government, or for any bureau thereof, or for any office therewith connected," to be published,*

 Compromise of Claims of the United States.

except under written authority from the head of such Department, applies to all such offices, or only to such as are *at the seat of Government*; and mentions that great inconvenience has arisen from the former construction, which is the one which has prevailed since the enactment of the provision, viz, 1870.

I have considered the expression, and am of opinion that it extends to offices connected as above, no matter where situated. The general phrase occurring as early as the act of August 26, 1842 (5 Stat., 523), the context there (sections 15 and 16) shows that Congress adverted to the circumstance that an express qualification might be required to limit its application to offices at the seat of Government. Section 15 is reproduced by section 178 of the Revisal. Other sections of Title IV suggest the same conclusion.

With great respect, your obedient servant,

S. F. PHILLIPS,

Solicitor-General.

Hon. GEORGE W. McCRAEY,

Secretary of War.

Approved:

CHAS. DEVENS.

 COMPROMISE OF CLAIMS OF THE UNITED STATES.

Section 3469 Rev. Stat. does not confer upon the Solicitor of the Treasury a discretion to recommend for compromise by the Secretary of the Treasury cases in which the claim is entirely solvent, but where circumstances of hardship, &c., exist.

DEPARTMENT OF JUSTICE,

January 8, 1879.

SIR: Referring to your communication of the 20th ultimo, addressed to the Attorney-General, in reference to section 3469 of the Revisal, asking whether it confers upon you a discretion to *recommend for compromise* by the Secretary of the Treasury cases in which the claim is entirely solvent, but where circumstances of hardship, &c., exist, I have to say that in my opinion it does not.

The purport of the section is that, as to certain claims in favor of the United States in the hands of district and other

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attorneys for collection; such attorneys may make reports showing the *condition* thereof, "and the terms upon which the same may be compromised," and recommending the acceptance of such terms, whereupon, if the same be also recommended by the Solicitor of the Treasury, the Secretary of the Treasury is authorized to compromise accordingly.

It seems to me that the phrases *condition of the claim* and *may be compromised* both indicate the circumstances which alone authorize the recommendation. The first denotes *doubtful* claims, and the second directs the attorney to report the *most that can be had* by compromise.

The title and structure of the act of 1863, from which this section was copied, is to the like effect. That title is, "An act to prevent and punish frauds upon the revenue, to provide for the more certain and speedy collection of claims in favor of the United States, and for other purposes" (12 Stat., 737). The act consists of fourteen sections, the first eight of which plainly concern frauds upon the customs; the ninth directs the Solicitor of the Treasury to dispose of unproductive property acquired by the United States under judicial proceedings or otherwise; the tenth is that in question; the eleventh gives to district attorneys a commission of 2 per cent. upon all moneys collected under the revenue laws; the twelfth and thirteenth provide for the defense of collectors, &c., by district attorneys; and the fourteenth is a repealing section. The first eight, then, come under the first clause of the title, the next three under the second, and the last three under the third. The ninth is a means for turning the fruits of former judgments and executions into *money*; the tenth for the better ascertainment and realization of the *value* of claims in the course of collection; while the eleventh is intended to increase the diligence of the district attorneys, upon whom, mainly, devolves the duty of carrying out the policy of the section immediately before. The amount of their compensation is made to depend upon the amount of what they secure by the compromise which they recommend.

The relation between the body of this act and its title is the more relied upon because it appears from the *Globe* that its main outlines and its title, as introduced, were preserved during its passage through Congress.

Commutation for Quarters.

These are some of the reasons which have led me to conclude that the section in question confers no authority in regard to cases merely *hard*.

If the language and general purview of the act were more doubtful than they seem, it would have to be borne in mind that the *grace* of the Government, as regards its debtors, is vested in Congress; that *hard cases* are proverbially *quick-sands*; and, therefore, it would require clear and specific words to show that the legislature had devolved upon another department so broad and indefinite a prerogative over the public purse.

Very respectfully,

S. F. PHILLIPS,
Solicitor-General.

Hon. KENNETH RAYNER,
Solicitor of the Treasury.

Approved :

CHAS. DEVENS.

COMMUTATION FOR QUARTERS.

The act of July 29, 1876, chap. 239, taken in connection with sec. 24 of the act of July 15, 1870, chap. 294, continued to Army officers on leave of absence (during the period for which such leave may be granted to them thereunder "without deduction of pay or allowance") *quarters in kind*, but it did not authorize an allowance of commutation therefor. Where commutation for quarters is allowable to Army officers under section 9 of the act of June 18, 1878, chap. 263, it may include commutation for quarters for their servants, agreeably to the existing Army Regulations.

DEPARTMENT OF JUSTICE,
January 16, 1879.

SIR: Yours of the 15th of August last, addressed to the Attorney-General, requests his opinion upon two questions of law, as follows:

"Does the act of Congress approved July 29, 1876 (chap. 239, vol. 19, 102), authorize the allowance of quarters, or commutation therefor, during the period for which it is provided leave of absence may be granted without deduction of pay and allowances?

"Whether the last clause of paragraph 1068 Revised Regulations is operative within the meaning of section 9 of the

Commutation for Quarters.

act approved June 18, 1878, 'making appropriations for the support of the Army,' &c., so as to warrant the Secretary of War in allowing commutation of quarters for officers' servants?"

Upon consideration thereof, I submit the following reply :

1. It seems that the act of 1876, referred to in the former question, did *not* authorize *commutation* for quarters to *officers on leave*, "*without deduction of pay and allowances*," at the same time also that it did continue *quarters in kind* to such officers.

Such I gather to be the effect of the act of 1870, chapter 294, section 24, which gave the rule as to *allowances* at the time that the act of 1876 was enacted. The allowances *not to be deducted* by the act of 1876 were those *made* under the act of 1870. An express distinction between *commutation for quarters* and *quarters in kind* was drawn in the latter. A main object of its twenty-fourth section was to merge *allowances* in the *rate of pay* therein fixed. By a proviso thereto, however, "fuel, quarters, and forage *in kind* may be furnished as now allowed by law and regulation." This reference to "law and regulation" was for the purpose of defining rights to quarters, &c., in kind only. Commutation for quarters had already been abolished in the body of the section. The exception created by the proviso cannot be enlarged by construction so as to trench upon the body of the section further than its express words require.

The result seems to be that the act of 1876, read in connection with that of 1870, continued to officers upon leave *quarters in kind*, but did not allow them *commutation* therefor.

2. I am of opinion that the second question above is to be answered in the affirmative.

The act of 1878, mentioned therein, provides that *at all posts, &c., where there are public quarters belonging to the United States, officers may be furnished with quarters in kind in such public quarters, and not elsewhere: Provided, That at places where there are no public quarters, commutation therefor may be paid to the officer entitled, &c.* (20 Stat., 151).

It seems that the *commutation* spoken of is to have the same latitude of application that is due to the *quarters* mentioned in the same connection; and that as the latter term

Appointment of Cadet-Midshipmen.

includes all quarters incident to the rank of an officer—amongst others, those for servants—so the former applies to quarters for servants as well as for the officers individually.

In this reasoning you will observe that I concur with that of Attorney-General Akerman in his opinion of May 6, 1871, a copy of which you have made part of your communication.

Recurring to former legislation upon this general subject, I do not find *quarters for servants* expressly provided for. Yet the *Regulations* of the Army for more than forty years, as Congress all the while well knew, have made such provision, and the consequent administration in that respect of appropriations for the Army by the Quartermaster's Department have similarly been all the while sanctioned. Such being the case, it requires positive action by Congress to change the construction by which provisions for *officers' quarters* have so long been held to include provisions for their *servants' quarters* as well, whether *in kind* or as regards *commutation*. There is nothing in the act of 1878 to intimate such a purpose.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Solicitor-General.

Hon. GEORGE W. McCRARY,
Secretary of War.

Approved:

CHAS. DEVENS.

APPOINTMENT OF CADET-MIDSHIPMEN.

On March 6, 1878, a Representative in Congress was informed by the Navy Department of a vacant cadetship in the Naval Academy, which was to be filled by an appointment from his district. He recommended a candidate for admission, who failed to pass the examination held in June, 1878; he thereupon recommended another candidate, who failed to pass the examination held in September, 1878. The times fixed by the Regulations of the Academy for the examination of candidates for admission are June 11 and September 22 of each year. Held that the next recommendation of a candidate for admission to fill the said vacancy should not be made until after March 5, 1879.

Section 1515 Rev. Stat. is to be read as if the dates fixed by the Regulations of the Academy for the examination of candidates for admission

Appointment of Cadet-Midshipmen.

were inserted therein; and hence, by the existing law, the season for recommendations and nominations of cadet-midshipmen begins after the 5th of March and expires on the 22d of September in each year.

DEPARTMENT OF JUSTICE,
January 18, 1879.

SIR: Yours of the 11th instant, addressed to the Attorney-General, states the following case and questions:

"On the 6th of March, 1878, Hon. S. A. Bridges, Representative of the tenth Congressional district of Pennsylvania, was informed, as required by law (sec. 1514 Rev. Stat., 2d ed.), of a vacancy at the Naval Academy for the appointment of a cadet-midshipman from that district, and was requested to recommend a candidate to fill the vacancy. He duly recommended a candidate, and that candidate failed, in June, 1878, to pass the required examination. On the 29th of June, 1878, Mr. Bridges was, as required by law (sec. 1516 Rev. Stat.), informed of the failure of said candidate to pass the required examination, and was requested to recommend another to be examined in September following; he did so recommend, and the candidate failed on examination in September, 1878. He now asks whether he has the right at this time to recommend another candidate. As the question involved is one of great importance, and has arisen many times in previous years, and is constantly arising, I have the honor to request, as early as practicable, your opinion as to the right of Mr. Bridges and the duty of the Department in the premises.

"I beg leave also to request your opinion whether Mr. Bridges can *now* recommend a candidate *for examination in June, 1879, or for examination at once.*

"The times for the examination of candidates, as fixed by the Regulations (copy inclosed), are June 11 and September 22 of each year. The academic year commenced October 1 last, at which time the *classes* at the Naval Academy were formed and the studies began."

Upon consideration, I am of opinion that the next recommendation of a cadet-midshipman for the vacancy in question should be made after the 5th day of March now approaching.

A casual perusal of section 1514 of the Revisal might suggest that the date, "5th day of March," therein contained applies only to the *notification* spoken of, and does not prevent

Appointment of Cadet-Midshipmen.

the *recommendation* from being made sooner, in case the member has otherwise been informed of the vacancy. Although it may be conceded that a previous notification is not essential to the validity of a recommendation, upon reflection it seems that *the date* is so. The mention of dates in that connection occurs first in the act of July 14, 1862 (section 11), from which section 1514 was taken. The expression there (12 Stat., 585) is, "From and after the 5th of March, 1863, the nomination of candidates for admission into the Naval Academy shall be made between the 5th of March and the 1st of July of each year, upon the recommendation of the member, &c. And it shall be the duty of the Secretary of the Navy, as soon after the 5th of March as possible, to notify in writing each member and delegate of any vacancy," &c. The effect of this expression was to postpone the operation of the enactment until the coming in of a new Congress, and to establish a process by which the members of that Congress, and of all others, might control the appointment of cadet-midshipmen made during their respective terms of office.

Inasmuch as section 1515 of the Revisal is to be read as if *the dates* fixed by the regulations of the Academy had been expressly inserted therein, it becomes plain that by law the season for recommendations and nominations of cadet-midshipmen begins after the 5th day of March and expires on the 22d day of September in each year. In this way—except in case of accident (such as neglect, failure, or death)—is secured to members, as seems reasonable, the control of all appointments to be made during any current year of their respective terms.

I have in this connection considered the opinion of Attorney-General Bates, which appears on page 46 of volume 10 of the *Opinions, &c.*, and, as you may observe, I do not concur in some of the views therein expressed.

Very respectfully, your obedient servant,

S. F. PHILLIPS,

Solicitor-General.

Hon. R. W. THOMPSON,

Secretary of the Navy.

Approved:

CHAS. DEVENS.

CASE OF MAJ. JOSEPH B. COLLINS.

The act of March 3, 1879, chap. 201, authorized the President "to reinstate Maj. Joseph B. Collins, late of the United States Army, and to retire him in that grade, as of the date he was previously mustered out; charging him with all extra pay and allowances paid him at that time." *Held*, 1st, that under that enactment the proper mode of reinstating Major Collins is by an appointment after nomination to and confirmation by the Senate (but see, *contra*, the NOTE on page 626, *infra*); 2d, that upon reinstatement he becomes entitled to pay, by virtue of the same enactment, from the date when he was previously mustered out.

DEPARTMENT OF JUSTICE,

April 10, 1879.

SIR: Yours of the 5th instant calls attention to the act of Congress approved March 3, 1879, "for the relief of Joseph B. Collins," and asks *whether a nomination and confirmation by the Senate is essential to its execution; and also from what time with relation to his reappointment the right to pay of the said Collins shall take effect according to law.*

The act is as follows:

"That the President be, and he is, hereby authorized to reinstate Maj. Joseph B. Collins, late of the United States Army, and to retire him in that grade, as of the date he was previously mustered out; charging him with all extra pay and allowances paid him at that time."

1. In interpreting this act, it is to be observed that whether Major Collins was to be reinstated after "nomination and confirmation" or otherwise, some legislation was necessary. But for such legislation the President could not "reinstate" him under any form of proceeding. The existence of the special act therefore throws no light upon the former part of the question which you put. Nor is there anything to that effect in the language which it employs. The word "reinstate," which is all that to such purpose can be relied upon, is not a technical word, but merely denotes *the*

Case of Maj. Joseph B. Collins.

effect of the President's action, in whatever form manifested, and leaves that *form* to be ascertained by the general law.

Whether the *reinstatement* takes place under the former or latter provision of the Constitution upon the subject of action by the President in these cases, (Art. 2, cl. 2, sec. 2), it must still be by "*appointment*." The executive function in filling offices, whether after or without nomination, is equally *appointment*. The word *reinstate*, therefore, indicates no particular views upon the part of Congress as to the manner in which Major Collins is to obtain relief.

This conclusion of course determines the question under consideration; for the constitutional authority of the President to appoint, without a previous nomination and confirmation, is *exceptional*, and must have been conferred by express legislation. This is plain, and hardly needs reference to the opinion of Attorney-General Cushing (6 Opin. Attys. Gen., 1).

As for the second part of your question, I am of opinion that the act confers *a right to pay* from the date at which Major Collins was mustered out.

In the first place, the general reason for not allowing officers restored to active-service pay during their absence is probably because pay in this service depends upon *activity*, or *liability thereto*. The non-existence of this *consideration* during such absence is probably the reason why it has been thought that in these cases *pay* was not due. This consideration has little or no existence for members of the retired service. Their pay is mainly in consideration of *past services*.

Reinstatement in such service, as of a particular date, means therefore naturally to carry with it a corresponding reinstatement in pay.

Special features of this act are to the same effect; for instance, that subjecting Major Collins to certain charges, *the reason of which* appears to be that by the act he was to receive pay and allowances for the very time covered by the amounts so to be charged.

Upon the whole, I am of opinion that Major Collins is to be reinstated by an appointment made after nomination and confirmation; and that upon such reinstatement his right to

Tonnage upon Hanseatic Vessels.

pay takes effect as of the date when he was previously mustered out.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Solicitor-General.

The SECRETARY OF WAR.

Approved:

CHAS. DEVENS.

NOTE.—In the case of *Collins v. United States* (14 C. Cls. R., 568) the Court of Claims hold that the act of March 3, 1879, quoted in the foregoing opinion, confers authority on the President alone to reinstate the officer, without the advice and consent of the Senate. See also same case in 15 C. Cls. R., 22, where the same ruling is reaffirmed, and where it is furthermore held by the court (agreeing with the foregoing opinion) that the officer is entitled to pay from the date when he was previously mustered out.

TONNAGE UPON HANSEATIC VESSELS.

The exaction of tonnage duty, under section 15 of the act of July 14, 1862, chap. 163, upon Hanseatic vessels is not in contravention of treaty obligations arising out of the treaty between the United States and the Hanseatic Republics of December 20, 1827.

DEPARTMENT OF JUSTICE.

May 7, 1879.

SIR: The circumstances connected with the claim of Herman Koop & Co., the subject of your communication of the 29th ultimo, I understand, from the papers presented, to be as follows:

By the treaty of December 20, 1827 (Rev. Stat., 2d part), the United States and the Hanseatic Republics agreed (Art. 9) that neither party would "grant any particular favor to other nations in respect of commerce and navigation which shall not immediately become common to the other party," &c.

By the proclamation of President Van Buren, of June 14, 1837 (11 Stat., 783), authorized by the act of 1832, chap. 207 (4 Stat., 578), all vessels of the Kingdom of *Greece* were exempted from paying tonnage tax in ports of the United States.

By the act of 1862, chapter 163, section 15 (12 Stat., 558), "a tonnage duty of 10 cents in addition to any tonnage duty now

Tonnage upon Hanseatic Vessels.

imposed by law" was laid upon all vessels "which after the 31st of December, 1862, shall be entered at any custom-house in the United States from any foreign port or place; provided that nothing in this act contained shall be deemed in any wise to impair any rights and privileges which shall have been or may be acquired by any foreign nation under the laws and treaties of the United States relative to the duty or tonnage of vessels."

The claimants contend that the exemption given to Greece (as above) under the proclamation of 1837, by virtue of the provision above quoted from the treaty of 1827, immediately became common to the Hanseatic towns, and therefore, as regards the latter, have remained unaffected by the above act of 1862, having been a privilege acquired under a treaty of the United States.

The claimants also submit that by virtue of the act of 1830, chapter 219 (4 Stat., 425), Hanseatic vessels were exempted from tonnage tax in the ports of the United States, inasmuch as vessels of the United States were then so exempted in Hanseatic ports.

To this construction the United States reply :

(1.) That inasmuch as the vessels in question, at the time of the above proclamation, were already exempt from tonnage duty (4 Stat., 425), that proclamation conferred upon Greek vessels nothing which, as against Hanseatic vessels, could be regarded as a *favor*, and therefore nothing upon which the treaty of 1827 could operate. And inasmuch as subsequently the operation of the proclamation ceased at the very moment with that of the act of 1830, there was no time at which the treaty of 1827 could act upon the statutory grant to Greece considered as a *favor*.

(2.) Supposing this to be otherwise, and that the treaty did operate to render the favor common, such favor (if not otherwise, at least by virtue of being "common") must necessarily have been the *same* in substance for both grantees; *i. e.*, must have become a favor to the Hanseatic towns identical in quality and other characteristics with that originally conceded to Greece; so that *there would be nothing in its nature* to prevent the former from being put an end to by whatever put an end to the concession to Greece.

Tonnage upon Hanseatic Vessels.

Upon consideration, it seems that both of these positions are correct.

1. It appears plain that the title of Hanseatic vessels to exemption from tonnage tax during the whole time that Greek vessels were so exempt (*i. e.*, from December 20, 1837 to January 1, 1863) was *by statute* (of 1830, chap. 219), and not *by treaty*. It antedated any title that could have been claimed by treaty, and I know of no principle by which the former became *merged* when the latter might have arisen.

Nor can it be said that the treaty operated at all events to render the previous statutory right *more secure*. The character in respect to durability belonging to a favor conceded by treaty depends not upon its being found in such an instrument so much as upon the particular words employed to define it therein. The question in such cases is, What are the words of concession? In the present case they are in substance that Hanseatic vessels should have the same favor as Greek vessels. It seems unnecessary to stop to argue that in order to be *the same*, they must be the same in duration as well as in other matters of substantial definition. The proclamation of 1837 granted to Greece a favor no greater in any quality than what had already been given to the Hanseatic Republics by the act of 1830, and it was *this* if anything that by the treaty of 1827 was to become *common*. It is apparent, then, that the concession to Greece could be used to enhance that already made to the Hanseatic Republics in no respects; *i. e.*, that in this regard it was *nothing*.

2. I have already spoken of the character of the concession which the treaty (supposing it operative) rendered *common* to the two grantees; *i. e.*, that in the nature of things it was *identical* for both. If, then, the act of 1862 abolished the exemption for one, it must have done so for the other. But, as we are now supposing that the *title* of the claimant was *by treaty*, it might be that the statute which abolished exemption from tonnage duty drew a distinction, and in terms did not operate upon this sort of title. Upon inspection, it appears that the act of 1862 draws no distinction between exemption by statute and exemption by treaty. It excepts from its operation *rights and privileges* to such exemption acquired by any foreign nation under the "*laws and treaties*"

Tonnage upon Hanseatic Vessels.

of the United States. That is, were a case of exception made out in other respects, it would be immaterial whether the *title* to it were by statute or by treaty. Or, in other words, if the only difference between the rights of the Hanse towns and Greece, in the case before us, is that the one is held by treaty and the other by statute, both fall before the act of 1862, or both continue.

It is suggested that the act of 1862 did not operate to lay tonnage duty in any case unless where a duty of that sort already existed, inasmuch as its words are that the duty imposed by it is to be laid *in addition to any now imposed by law*. Therefore, that no duty was thereby imposed upon the vessels of either Greece or the Hanse towns. This suggestion does not appear to be *pressed*, and certainly is not valid. "*In addition to any*," means here *in addition to what, if any*.

Without speculating upon cases in which such exemptions by statute or treaty might properly be defined as *rights* or *privileges acquired* (within the above quoted exception to the act of 1862), it seems that where the exemption turned upon mutuality alone, and five and a half months' notice of a change of policy was given to the other party, there can be no well-founded suggestion of a violation of an acquired right or privilege.

In conclusion, it seems that in reason this claim is *felo de se*; because upon a title to equality a manifest inequality is sought to be founded. It would be a singular result if what is known as *the most favored nation clause* in treaties were to be allowed an operation to confer privileges *more extensive* than those where concession to another is appealed to and recognized as *the standard* of common enjoyment.

Upon the equity of the case, then, no less than upon the terms of the stipulation, I answer your question by saying that the exaction in question was not in contravention of treaty obligations between the United States and the Hanse towns.

Very respectfully,

S. F. PHILLIPS,
Solicitor-General.

H. F. FRENCH, Esq.,

Assistant Secretary of the Treasury.

Approved:

CHAS. DEVENS.

Bounty of Colored Soldiers.

BOUNTY OF COLORED SOLDIERS.

Bounty can lawfully be paid, under act of July 11, 1862, chap. 144, to one who claims as father of a colored soldier without other proof of heirship than that the claimant and the soldier's mother lived together as man and wife; assuming that the claimant, mother, and soldier were all slaves at the time of the soldier's enlistment, that there is no sufficient rebutting evidence in the case, and that the living together was at the proper time. In default of father and mother, the bounty can be paid, under like circumstances, to one claiming as brother or sister, who was not born of the soldier's mother.

The distinction made by statute between colored and other soldiers in pension cases, &c., in regard to proof of marriage (sections 2037 and 4705 Rev. Stat.), extends only to the marriage of *the soldier*, and does not affect that of his parents or other relatives.

DEPARTMENT OF JUSTICE,

May 9, 1879.

SIR: Yours of the first instant, addressed to the Attorney-General, asks "whether, under the act of July 11, 1862, bounty can lawfully be paid to a claimant as father of a colored soldier, without other proof of heirship than such as is furnished by the fact that the claimant and the soldier's mother lived together as man and wife, assuming that the soldier, the soldier's mother, and the claimant were all slaves at the date of the soldier's enlistment; also, assuming that all parties were slaves, can such bounty be paid (in default of father and mother) to one claiming as brother or sister, who was not born of the soldier's mother?"

The distinction made by statutory law of the United States between colored and other soldiers in regard to proof of marriage in pension cases, &c. (Rev. Stats., secs. 2037, 4705), extends only to the marriage of *the soldier*, and does not affect that of his parents or other relatives.

As to marriage other than that of the soldier, the law of evidence (in general) is that indicated in the late case of *Meister v. Moore*, 96 U. S., 76, and previously, for pension cases, stated in like terms by Attorney-General Mason, in 4 Opin., 496. The result seems to be that what at common law is only presumptive evidence of marriage has by statute, for the purposes of the pension laws, with slight change, been made proof of the marriage of the soldier who earned the pension.

Light-House.

Under the system of slavery it was held that slaves could not be parties to *marriage*. There was, nevertheless, a *like institution* recognized as existing among them. It seems that after the pressure of slavery has been removed, the law succeeding it, when required by the presentation of competent new questions, will generally consider that like institution as having been *marriage* under whatever circumstances would have made it such amongst free persons.

Assuming, therefore, that there is no sufficient rebutting evidence in the case mentioned in your former question, and that the *living together* spoken of was at the proper time; assuming also that all circumstances expressed or implied in the former question are so in the second as well, I answer both in the affirmative.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved:

CHAS. DEVENS.

LIGHT-HOUSE.

A right to send rays from a light-house across a private close, unobstructed by future erections thereon by the owner, is an easement which must be gained by the United States in the usual way, *i. e.*, by grant, express or implied, from the owner of the close. In the absence of such a grant by the owner, his right to build upon the close remains intact; and, if he is unwilling to make a grant, the United States are left to have recourse, under the law of eminent domain, to condemnation of the property for the public purposes involved.

DEPARTMENT OF JUSTICE,

September 29, 1879.

SIR: The facts in the case of the Marblehead light-house, alluded to in yours of the 9th instant addressed to the Attorney-General, the light of which is said to be materially threatened by the building of houses by property owners in that vicinity, are not stated with sufficient detail to warrant any definite opinion upon the rights of the United States in that instance.

Sinking Fund of the District of Columbia.

It seems that an adverse right by the United States to send rays from a light-house across a private close is an easement which is to be gained in the usual way, *i. e.*, by grant, express or implied, from the owner of such close. Nothing is said in the communication from the Light-House Board, transmitted by you, to indicate whether this principle applies in the present case.

In the absence of special dealing, as above suggested, between the United States and the owners of neighboring property, it seems that the ordinary rights of the latter to build thereupon remain intact, leaving to the United States their remedy, under the law of eminent domain, to condemn the property for the public purposes involved.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Solicitor-General.

Hon. JOHN SHERMAN,
Secretary of the Treasury.

Approved:

CHAS. DEVENS.

SINKING FUND OF THE DISTRICT OF COLUMBIA.

Upon consideration of the provisions of section 13 of the act of March 3, 1877, chap. 117, section 7 of the act of June 11, 1878, chap. 180, and section 3 of the act of March 3, 1879, chap. 182: *Held* that a previous requisition on the Secretary of the Treasury by the Commissioners of the District of Columbia is necessary to authorize a warrant for disbursing the sinking fund of the District by the Treasurer of the United States.

DEPARTMENT OF JUSTICE,

September 29, 1879.

SIR: I have considered the questions which at the instance of the Commissioners of the District of Columbia (see their communication of August 23, 1879) you have referred to the Attorney-General, and herewith I submit a reply.

Upon certain dealings in regard to the sinking fund belonging to the District, a question has arisen whether the Treasurer of the United States can disburse that fund in course of law except as authorized from time to time by *requisitions* of the Commissioners of the District.

Another question is made, but the facts thereupon appear

Sinking Fund of the District of Columbia.

from the accompanying papers to be unascertained, and therefore it will not be considered.

Previously to the act of 1877, chap. 117 (19 Stat., 396), the funds of the District of Columbia were kept in depositories—usually banks—those required for ordinary expenses to the credit of the treasurer of the District, and those of the sinking fund to the credit of the commissioners of that fund. By acts passed in 1878 and since, these funds are required to be paid into the Treasury of the United States.

By acts of its legislative assembly in 1871 (chaps. 52 and 58), moneys required for the ordinary expenses of the District were disbursed by its treasurer under a warrant from its comptroller authorized by a previous certificate from its auditor; whilst moneys required in the course of managing the sinking fund were disbursed by warrants of the commissioners of that fund alone.

The act of 1874, chap. 237 (18 Stat., 117), abolished certain offices theretofore existing in the District, but made no change in the matters above stated.

The act of 1877, chap. 117, “for the support of the District of Columbia,” by its thirteenth section required all the moneys of the District to be paid into the Treasury of the United States, and then to be disbursed only upon warrants of *the accounting officers of the District*, to be issued under the “direction of the Commissioners of the District.”

It seems plain under this provision that money collected for the sinking fund was to be paid into the Treasury of the United States, and therefore equally plain that any warrant by its Commissioners for its disbursement required before issuing a *direction* by the District Commissioners.

By the act of 1878, chap. 180, sec. 7 (Pamph., 107), the duties of the sinking-fund commissioners were transferred to the Treasurer of the United States, who was required to act therein under “the provisions of existing law.”

We have seen that these provisions of law required a *direction* from the District Commissioners to authorize any warrant for disbursing the sinking fund.

Finally, the act of March 3, 1879 (sundry civil act), renders (Pamph., 410) a *requisition* by the District Commissioners necessary for drawing from the United States Treasury any

INTERNAL REVENUE—TAX ON DISTILLED SPIRITS.

money appropriated thereby or otherwise collected for the purposes of the District.

Upon the whole matter it seems that after the act of 1877, above cited, no money could be disbursed by the sinking fund commissioners except upon warrants *directed* by the District Commissioners; that this was a part of the law referred to as to govern the United States Treasurer upon his succeeding to that office; and, therefore, that the above provision of the act of 1879, upon the general matter (although obviously inadvertent in its application to *the whole act*), conforms to a deliberate policy of Congress.

I am, therefore, of opinion that a previous requisition upon the Secretary of the Treasury by the District Commissioners is necessary to authorize a warrant for disbursing the sinking fund by the Treasurer of the United States.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Solicitor-General.

The PRESIDENT.

Approved:

CHAS. DEVENS.

INTERNAL REVENUE—TAX ON DISTILLED SPIRITS.

The "tax on deficiency" in the quantity of distilled spirits exported, when compared with the quantity withdrawn for exportation (see acts of June 9, 1874, chap. 259, and March 1, 1879, chap. 125), may be collected by distraint upon the property of the withdrawer of the spirits, as well as by suit upon the transportation bond.

Such tax is secured by a lien, under the general provision contained in section 3186 Rev. Stat., upon all the property of the person liable therefor. The special provisions found in section 3251 Rev. Stat. do not forbid the application of the general provision of section 3186 to all cases where there is nothing in such special provisions to contradict. The receipt of the ascertainment of deficiency by the collector of internal revenue from the collector of customs is, in effect, his receipt of an assessment list of the tax, within the meaning of section 3186, as amended by the act of March 1, 1879, chap. 125.

DEPARTMENT OF JUSTICE,
October 2, 1879.

SIR: The question submitted in yours of August 11, addressed to the Attorney-General, concerns the *character* of

Internal Revenue—Tax on Distilled Spirits.

the debt which is due to the United States on account of the tax imposed by statute upon any *deficiency* in the amount of *spirits* actually *exported*, when compared with that *withdrawn for exportation*. (Acts of June 9, 1874, 18 Stat., 64, and of March 1, 1879.)

One case in which spirits may be withdrawn from a distillery without payment of tax is where *withdrawn for exportation*. The method of withdrawal for exportation pursued in the case before me was by giving a *transportation* bond, which protects the spirits while going forward to the port of exportation, and, presumably, was followed by an *exportation* bond, given after the spirits were laden on board ship. In such transactions it is necessary, of course, to secure the *exportation*, in fact, of the whole amount of spirits *withdrawn*. The gauging that occurs previous to withdrawal is, therefore, followed by another which takes place alongside of the ship that is to carry the spirits abroad. Any deficiency so shown to exist, as regards the amount of spirits withdrawn, becomes a charge upon the bond for transportation, and a statement thereof is sent by the customs collector to the collector of internal revenue for the district in which the distillery is situated, who is required to collect the tax thereon; and upon that the transportation bond is canceled.

For the United States it is insisted in the case before me that the money due upon such deficiency is, by nature, *tax money*, and, therefore, that though it may be collected by suit on the bond, it may as well be collected by distraint upon the property of the withdrawer, inasmuch as by a well-known statutory provision a tax due to the United States created a *lien* upon all the property of him who owes it. (Rev. Stat., sec. 3186, amended by act of 1879, chap. 125, § 3; and sec. 3330.)

On the other hand, it is contended for the withdrawers that the claim due to the United States is, at most, *only* a debt, and, therefore, to be collected only by suit upon the bond.

In my opinion such debt is a *tax*, and may be collected by distraint as well as by suit.

The learned gentlemen who have so well presented the case of the withdrawers in the present instance speak of the spirits as *tax free* upon withdrawal, and put the question, with some

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animation, *when* does a tax attach again? That the spirits are ever tax free until actually landed in the foreign country is an *argument*, and is not declared by the statute. They are, by the *words* of the law, only spirits innocently withdrawn, *without payment of tax*; an expression which suggests that they are not actually tax free. Such freedom, in fact, is only *in fieri* during transportation and exportation, and becomes *factum* only when landed in a foreign country. During such period the *debitum* remains, while the *solvendum* is suspended. If the process of exportation be successfully carried out, the spirits become *free*, but, if that miscarry, the dormant liability revives and the tax is to be exacted.

The case is not one in which a person has gotten hold of crooked spirits which he did not know to be liable to tax, but one in which he has voluntarily and with the consent of the Government taken into his possession spirits, the tax upon which he knew to be unpaid, and which he took *cum onere* of such tax being exacted in case he did not carry out the engagement upon which he procured possession of them.

I am not saying that the parties here are *morally* blamable for not carrying out their engagement. What I mean and need only to say is, that the *words* of the statute creating the tax liability, so far as can be seen, apply to this case as much as to one of a voluntary breach of engagement.

I conclude, then, that the circumstances of a transaction of withdrawal of spirits for exportation renders the withdrawers liable in certain events *as for a tax*.

The fact that a bond is given to secure the engagement does not in this case defeat or contradict the lien, for such bond therein only takes the place of the distillery bond or of the warehouse bond, which had previously co-existed with the lien. So great was apprehended the difficulty of securing to the United States taxes laid upon spirits that not only is it constantly secured by a bond, but also by a sweeping lien upon all the property of the tax debtor.

It has been urged that the general provision for lien in section 3186 of the Revisal does not apply to spirits, because a more specific provision for a lien upon this subject is made elsewhere—§ 3251, &c. It may be true that because of the *greater definiteness* of the special provision for a lien for the

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tax upon spirits there is rarely occasion for calling in the provision for a lien for taxes in general, but there is nothing to forbid that general policy to apply in all cases where there is nothing in the special policy to contradict. Again, it is said that by the amendment to section 3186 (above), contained in the act of March 3 last (1879, chap. 125), no lien arises until an *assessment list* containing the deficiency tax has been received by the collector. It may be that the present questions arose before the adoption of such amendment; but granting that they did not, there is no *magic* about the word *assessment*, any legal ascertainment of the particular tax being, in fact, its *assessment*; or, to apply the rule to the case in hand, the receipt of the ascertainment of deficiency by the collector of internal revenue from the customs collector is, in effect, his receipt of an *assessment list* of the tax. (*Savings Banks v. The United States*, 18 Wall., p. 246.)

Mr. Abrahams has suggested that the words "except when otherwise provided," in the above act of 1879, are of importance to the contention of his clients; but that expression requires for its operation some statutory provision that in certain cases there shall be either no lien, or no lien except from a time or event in such other statute provided—and no such statute is suggested, or otherwise appears, to apply here.

It is hardly necessary to add, in reply to what has been suggested for the withdrawers, that no pains taken by the Treasury Department to promulgate its views upon the importance and the proper methods of securing the tax *by suit upon the bond* can create an *estoppel* against that Department, much less against the United States, from enforcing the claim in any other way that is according to law.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Solicitor-General.

THE SECRETARY OF THE TREASURY.

Approved:

CHAS. DEVENS.

Inspector-General's Department.

INSPECTOR-GENERAL'S DEPARTMENT.

The number and rank of the officers authorized by law to be permanently maintained in the Inspector-General's Department, in the Army, are fixed by the acts of June 23, 1874, chap. 458, and December 12, 1878, chap. 2, as follows: One brigadier-general, two lieutenant-colonels, and two majors.

DEPARTMENT OF JUSTICE,
October 2, 1879.

SIR: Yours of the 16th ultimo, addressed to the Attorney-General, after quoting the various provisions upon the subject of the Inspector-General's Department to be found in the acts of 1874, chap. 458; 1878, chap. 2; and section 1131 of the Revised Statutes, second edition (which incorporates a provision of the act of 1877, chapter 69), asks, "What is the force or organization provided by law to be permanently maintained" in that department?

¶ The Revised Statutes still purport to represent the state of the general and permanent statute law of the United States, as this was December 1, 1873.

The acts of 1874 and 1878, quoted by you, are both of them later in effect than section 1131, even as amended by the act of 1877.

By the act of 1874, the permanent Inspector-General's Department is to consist of one colonel, two lieutenant-colonels, and two majors. By the act of 1878, "the rank of the senior Inspector-General shall be brigadier-general," &c., "provided, that nothing herein enacted shall authorize any increase in the number or the rank of the other officers of the Inspector-General's Department as fixed by the first section of the act of June 23, 1874."

What the act of 1878 chiefly provides for is the future rank of the "*senior officer*," &c., *i. e.*, by reference to the act of 1874 of *the officer who before had been colonel*. When afterwards it mentions "*other officers*," it therefore must mean *officers other than senior*, *i. e.*, by the above reference, the *lieutenant-colonels and majors*; as to these it provides expressly that their number and rank is not to be increased.

It follows, then, upon the whole, that the acts of 1874 and 1878 give the law at present for the number and rank of the

Widow Pensioner—Arrears of Pension.

officers in the Inspector-General's Department, and, so, that such number is *five*; and their respective rank, *one brigadier-general, two lieutenant-colonels, and two majors.*

I am, very respectfully, your obedient servant,
S. F. PHILLIPS,
Solicitor-General.

The SECRETARY OF WAR.

Approved:

CHAS. DEVENS.

WIDOW PENSIONER—ARREARS OF PENSION.

An officer in the military service, during the rebellion, was discharged March 22, 1864, and died February 26, 1878, of disease contracted in the service. He was not a pensioner, nor had he ever applied for a pension. His widow, having obtained a pension running from the date of his death, made application under the acts of January 25, 1879, chap. 23, and March 3, 1879, chap. 187 (passed since her pension was obtained), for arrears of pension from the date of his discharge. *Held* that the application is not allowable under those acts.

DEPARTMENT OF JUSTICE,
October 9, 1879.

SIR: The case of the pensioner, Mrs. Lord, as to which you have asked the opinion of the Attorney-General, is as follows: Her husband, a captain during the late rebellion, was discharged from the military service March 22, 1864, and died February 26, 1878, of disease contracted in such service. He was not a pensioner, and had never applied for a pension. Since his death Mrs. Lord has drawn a pension, running from that date.

She now applies, under the act of 1879, chaps. 23 and 187, for arrears of pension from the date of the *discharge* of her husband.

Upon consideration, I think that her application cannot be allowed.

The general system of the pension law as heretofore administered has at all times distinctly recognized two or more *classes* of persons entitled: 1. The person *on whose account* the pension is given, *i. e.*, the soldier; and, 2, persons (such as widows, young children, and certain dependent relations),

Widow Pensioner—Arrears of Pension.

who are allowed a pension because of their relation to the former person. In the former case pensions have run from the date of the wound, or discharge, &c.; in the latter they have run from the death of the soldier, unless after the death or remarriage of a widow who has herself received it, in which case the children are entitled from her death or remarriage; or where the soldier died pending his application, in which case the widow is to have it in the same condition that he would have done, &c. (Rev. Stat., secs. 4702, 4718.)

Such being the previous state of the law upon this subject, the act of 1879, chap. 187, 20 Stat., 469 (*the other* is to like effect upon the point in question), provided that certain pensions, &c., &c., shall commence from the death or discharge of the person on whose account the claim has been or is hereafter granted, if the disability occurred prior to discharge, and if such disability occurred after the discharge, then from the date of actual disability, *or from the termination of the right of party having prior title to such pension.*

For Mrs. Lord it is suggested that the expression in italics is a variation of the date at which a pension is to begin where the disability occurred *after* the discharge only; and that in all cases where the disability occurred *prior* to discharge that date is from *death or discharge* only.

This suggestion is, in effect, that the act provides that in case of disability of the soldier before discharge, he, or, he failing, his widow is to have a pension from the date of death or discharge; but if such disability occurred after discharge, then *he* may draw it from the time of such disability, but he failing, *his widow* shall have it only from his death.

I think that no good reason can be assigned for such a distinction between two classes of widows, the one most favored by which has in many cases at least not had a disabled husband to nurse and support, while the other may have been compelled to do both for (in the year 1879) ten or fifteen years.

It seems clear that the clause is a recognition of the principle as to *classes* of pensioners, and that the persons spoken of prior to the passage italicised above, as those to whom under certain circumstances pensions are to be allowed, are

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those *on whose account* the pension is granted, and they only; and that the claim for pension of persons other than these, *for any case mentioned in the section*, rests upon the italicised passage alone.

It is also suggested that the expression in the passage italicised, *termination of the right of the party having prior title*, points only to the case in which such party has actually been allowed a pension; and in support of this it is said that by the general policy of the pension acts, the support of the wife out of the pension is supposed, so that if her husband has actually been a pensioner she has had all the law intended; but if he has not been a pensioner, then the country admits its indebtedness to her for what by her husband's neglect she had previously to his death failed to receive, and that this policy appears from the words now under consideration, even supposing them to apply to all the cases mentioned in the section.

In reply to this, it is to be said that the policy suggested does not appear in the law heretofore, for the reason, amongst many, that the special case in which it is provided that a widow can draw pension for a period anterior to her husband's death (viz, when he dies pending his application) excludes such rule in the cases not specified. And if such a policy were introduced lately, so important a change would have been marked by very definite language, so as to relieve the executive officers who have it to administer of unnecessary responsibility of deciding whether the statutory grant did or did not extend over a doubtful margin of several millions of dollars, more or less. But if Congress has at all had in view the support of the *wives* of pensioners, it has been indicated so very obscurely that no important conclusion can be drawn from it. The pensions allowed to soldiers are no greater because of their having wives and children; the unmarried man receives as much as the married. The wife of a disabled soldier has no status before the Pension Office to make avail in any way of the pension which her husband declines to draw. It is only after she has become a *widow* that the law takes her case into consideration. Before that event it is supposed that her husband, as husband, and not as pensioner, has provided for her support. It is the death of the husband,

 Extradition—Explanatory Evidence.

therefore, and not of the pensioner, that is important to her right.

There is no reason, then, arising from this supposed policy to restrict the expressions *right* and *prior title* to the case of *enjoyment* alone. They include that, no doubt; but they also include the case of a soldier who, under the *title* which the *statutes* give him, has a *right* to pension which he declines to reduce into enjoyment.

The conclusion of the whole matter is, that there is nothing in the acts of 1879, referred to above, to warrant an opinion that the well-established principle as to *classes* of pensioners has thereby been changed.

It follows that Mrs. Lord's claim cannot be allowed.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Solicitor-General.

The SECRETARY OF THE INTERIOR.

Approved:

CHAS. DEVENS.

 EXTRADITION—EXPLANATORY EVIDENCE.

Evidence of insanity is admissible in proceedings before a United States commissioner for the extradition of one who is charged with an extraditable offense under the treaty of 1842 with Great Britain and section 5320 Rev. Stat., to explain what has been proved in support of the charge.

DEPARTMENT OF JUSTICE,
October 17, 1879.

SIR: Yours of the 1st instant, addressed to the Attorney-General, transmits a copy of a note, &c., received by you from the British minister at this capital in relation to the case of one Catlow, recently arrested at New York for examination and commitment with a view to extradition for *murder*, under the tenth article of the treaty of 1842 with Great Britain. From your communication it appears that upon the hearing it was admitted that Catlow had committed the homicide in question, but the commissioner allowed evidence *as to his sanity* to be introduced, and thereupon was of opinion that at the time of such homicide he was insane, and therefore dis-

Extradition—Explanatory Evidence.

charged him. The British minister suggests that in admitting such explanatory evidence the commissioner erred, in consequence of which you ask for an opinion, whether the allegation of insanity can be allowed to prevent commitment for extradition of one against whom an act of homicide is clearly proved. This involves, of course, a consideration of the words of the treaty of 1842 that bear upon the matter, and perhaps as well also of those of the provisions of the Revised Statutes, section 5270, passed to give effect to the treaty stipulation.

The tenth article of the treaty of 1842, after stipulating for the mutual surrender of persons charged with certain crimes, &c., proceeds:

“Provided that this shall only be done upon such evidence of criminality as according to the laws of the place where the fugitive or person so charged shall be found would justify his apprehension and commitment for trial if the crime or offense had there been committed; and the respective judges and other magistrates of the two governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive.”

Section 5320 of the Revised Statutes, after providing for the arrest and hearing before some justice, judge, or commissioner of persons charged under the above treaty, proceeds:

“If on such such hearing he (the commissioner, &c.) deems the evidence *sufficient to sustain the charge* under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue, &c., for the extradition of the party charged.”

In the first place, it seems that the above statute coincides with the treaty upon the point in question, and therefore the duty of the commissioner as to the matter in question may well be tested by the language of the latter.

Extradition—Explanatory Evidence.

It is to be observed that the evidence as to sanity admitted by the commissioner in Catlow's case did not tend to *contradict or impugn the testimony* introduced as to the fact of homicide, but only to explain it, so as to show that the *consequence* otherwise deducible did not in fact follow.

It appears to be the general practice throughout the United States for committing magistrates to admit evidence which goes no further than to *explain* criminating circumstances previously made out. Mr. Bishop in his work on Criminal Procedure so lays down the law, citing therefor White's case, reported in 2 Washington's Reports of the circuit court of the United States, page 29, and making a quotation to the same purpose from a charge to the grand jury by Lord Denman, at Taunton assizes, in April, 1849, reported in 2d Carrington and Kerwan, page 845. (See Bishop, &c., vol. 1, sec. 233.)

In White's case the prisoner was brought before Judge Washington, of the Supreme Court of the United States, and Judge Peters, sitting together in the circuit court of the United States for Pennsylvania, in April, 1807, for commitment under a charge of having engaged in Mr. Burr's *expedition*; and evidence was introduced of his having on two occasions proposed to persons to join that expedition, and of having at the same time given them papers looking like, and supposed by the witness to be, bank-notes; thereupon the counsel for the defendant offered to read affidavits to prove that the proposal spoken of was all a jest. To this the attorney for the United States objected as unusual and improper. The court, however, allowed it as being matter merely *in explanation*. This decision seems to be strictly in point here, as what was proposed in each case was, admitting the existence of the facts previously given in evidence, to show by way of explanation an absence of criminal intention.

The words of Lord Denman are precisely to the same effect: "In all cases in which the prisoners charged with felony have witnesses, and those witnesses are in attendance at the time of the examination before the magistrate, I recommend that the magistrate should hear the evidence of such witnesses as the prisoner on being asked wishes to be examined in his defense. If such witnesses merely explain what has been proved in support of the charge, and are believed, they will

Life-Saving Service—Disposal of Wrecks.

actually have made out a defense on behalf of the accused, and there would of course be no necessity for any further proceedings."

With great respect, your obedient servant,

S. F. PHILLIPS,

Solicitor-General.

The SECRETARY OF STATE.

Approved :

CHAS. DEVENS.

LIFE-SAVING SERVICE—DISPOSAL OF WRECKS.

The commissioners of wrecks, appointed under the laws of the State of North Carolina, are "parties legally authorized to receive" property saved from shipwreck on the coast of that State, within the meaning of the proviso to section 4 of the act of June 18, 1878, chap. 265. It is accordingly the duty of keepers of life-saving stations within the limits of that State, under the provisions of that section, to deliver such property to the said commissioners whenever it is claimed by them.

DEPARTMENT OF JUSTICE,

October 18, 1879.

SIR: Yours of the 7th instant, addressed to the Attorney-General, asks for [his] opinion, "in view of the fourth section of the act of June 18, 1878, organizing the Life-Saving Service, and the statutes of North Carolina relative to wrecks, as to what instructions should be given, together with [his] opinion, whether the commissioners of wrecks referred to in said statutes of North Carolina are parties legally authorized to claim and receive property saved from shipwreck by the keepers and crews of 'life-saving stations,' within the meaning of the fourth section of the act of June 18, 1878, referred to; and, furthermore, who may be regarded as such parties."

The proviso to section 4 of the act of 1878, above mentioned (chap. 265, 20 Stat., 163), so far as it concerns this matter, is as follows: "That said keepers shall have authority and be required to take charge of and protect all property saved from shipwreck at which they may be present until it is claimed by parties legally authorized to receive it, or until otherwise instructed to dispose of it by the Secretary of the Treasury."

Life-Saving Service—Disposal of Wrecks.

Under our form of government, the ultimate right to personal and real property left without an owner is in the State within whose jurisdiction such property may be found. Generally the States have legislated so as to restrict this common-law right within narrow limits, making ample provision for the safe custody of the property, and for its transmission to any representatives of the former owners that may eventually be discovered. The statutes of the State of North Carolina, upon the matter of wrecks, passed originally about the beginning of this century are animated by this spirit. They are the same that in the case of the schooner *Tilton* (5 Mason, p. 177) were spoken of by Justice Story as being founded on a sound policy, and in furtherance of the principles of justice and humanity. In this estimate Chancellor Kent appears to concur (*Commentaries*, 2d, 322, n.). The above act of 1878 does not conflict with the rule just laid down. It merely makes provision for the *ad interim* custody of the property, and, where disposed of, of its proceeds. The United States do not thereby claim any interest in the wreck or any control as against parties having an interest, chief amongst whom is the State within whose territory the wreck occurs.

I am therefore of opinion that in North Carolina it is the duty of the keepers of life-saving and life-boat stations and houses of refuge to deliver property saved from wrecks, &c., to the commissioner of wrecks for that *district*, appointed under the North Carolina law, whenever such property shall be claimed by them; and that in all cases where no person is present at such wreck to claim the property as its owner, it will be prudent for the *keepers* to notify the *commissioner* to come forward and make claim thereupon. In case the commissioner neglects the notice for such time as shall seem reasonable to the Secretary of the Treasury, directions may be given by the latter for its *disposal* as provided in the statute, the right of the State as ultimate *dominus* being always kept in mind.

Very respectfully, your obedient servant,

S. F. PHILLIPS,

Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved:

CHAS. DEVENS.

Pilots on United States Vessels.

PILOTS ON UNITED STATES VESSELS.

The penalties imposed by State laws for piloting vessels without due license from the State have no application to persons employed as pilots on board of the public vessels of the United States, the latter vessels being within the exclusive jurisdiction of the United States.

DEPARTMENT OF JUSTICE,

October 22, 1879.

SIR: Yours of the 18th instant, addressed to the Attorney-General and referring to the case of Henry Sherwood, employed as a pilot on board the U. S. S. Minnesota during a recent voyage from Newport to Hampton Roads, has been considered.

You state that Mr. Sherwood has been arrested, and is now in jail in Virginia, under State process for having violated the laws of that State by acting as pilot aforesaid at Hampton Roads without due license, although he was then and there licensed by a United States inspector for a district including that place (Rev. Stat., sec. 4442.)

. It seems that the circumstance that he had a United States license must be laid out of the case, as such licenses do not apply to *public vessels* of the United States (Rev. Stat., sec. 4400).

I think it plain, however, that any penal regulations in State laws upon this subject have no application to persons employed as pilots upon vessels *whose decks are within the exclusive jurisdiction of the United States*. This was decided as to the matter before me by the supreme court of Massachusetts, in a case where a pilot was charged with having violated the State law in conducting the frigate Chesapeake out of Boston harbor in July, 1809 (*Ayers v. Knox*, 7 Mass., 306). I believe that this point has never been raised since. The reasoning of the court in Knox's case, of which a hint is given above, seems to be entirely conclusive.

It should be added that the Virginia statute probably is intended to have no application to such a case, for the pilot fees therein are regulated solely with reference to *registered* vessels; for other United States vessels no fees are given (Code of 1873, p. 773).

The United States attorney for the eastern district of Vir-

Duty on Mixed Cotton Goods.

ginia has accordingly been notified to give immediate attention to the case, so that Mr. Sherwood may be liberated from any unwarranted imprisonment.

Very respectfully, your obedient servant,

S. F. PHILLIPS,

Solicitor-General.

The SECRETARY OF THE NAVY.

Approved:

CHAS. DEVENS.

DUTY ON MIXED COTTON GOODS.

The expression "manufactures of cotton," as used in Schedule A, section 2504 Rev. Stat., includes manufactures in which cotton is the component material of chief value. Fabrics of the latter description being thus *enumerated* articles, the similitude provision of section 2499 Rev. Stat., has no application thereto. Such fabrics are dutiable under Schedule A aforesaid.

In classifying articles for duty, the rule is that the process of enumeration must be exhausted before that of assimilation is resorted to. *Advised*, therefore, that the Treasury ruling of 1874—viz, that textile fabrics composed of silk and cotton in which cotton is not the component of chief value, if such fabrics be substantially the same in character and uses as silk, should be classified for duty at the rate imposed upon manufactures in which silk is the component of chief value, by virtue of the similitude clause in said section 2499—be modified agreeably to the foregoing view.

DEPARTMENT OF JUSTICE,

October 29, 1879.

SIR: Yours of the 14th instant, addressed to the Attorney-General, calls attention to a decision of your predecessor in 1874: that textile fabrics composed of silk and cotton in which silk *is not* the component of chief value, if such fabrics be substantially the same in character and uses as silk, should be classified for duty at the rate imposed upon manufactures in which silk *is* the component of chief value, by virtue of the similitude clause in section 2499 of the Revised Statutes. You also state that this rule has occasioned discretion in levying duties at one port and another, because it is not based upon any certain quantity of silk in such goods; and thereupon you ask whether the limit of *silk chief value* established in

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schedule H of the Revised Statutes and the act of February 8, 1875 (18 Stat., 307), should not be administered as a *test* by which to determine whether goods shall pay as *silk*; and so whether the *similitude* clause, above mentioned, can be deemed applicable to goods which are *enumerated* as being manufactures of silk or manufactures of cotton, according to the prevailing component material.

In this connection you append a communication from Assistant Secretary French, of the 18th of July, last, directing the collector at San Francisco (under the principle in *Sussfield v. Arthur*, 96 U. S., 128) to classify certain "*wire nails*" as "*manufactures of iron not otherwise provided for,*" and *not* as assimilated to "*wrought board-nails.*"

Granting that such *wire nails* are not in fact *wrought board-nails*, it seems that the propriety of the above direction cannot be questioned, the rule of law being that in classifying articles for duty the process of *enumeration* must be exhausted before that of *assimilation* can be resorted to.

So if there be an *enumeration* in the tariff law covering *manufactures in which cotton is the component material of chief value*, it seems that the decision to which you refer cannot be maintained.

I have had some difficulty in determining that this is so, but upon the whole agree that there is such an *enumeration*.

In general it appears from a perusal of the revenue law that the expression *manufactures of* (some named material as) silk, flax, leather, iron, &c., means manufactures in which that is the only material, and therefore it is added, in that connection, "*or of which silk, &c., is the component material of chief value.*" (See schedules C, E, H, K, &c.) In regard to manufactures of *cotton* there is no such additional clause, (Schedule A,) and it seems that there has been none such for twenty years past, if ever. The act of July 14, 1862, however, covered this deficiency by a provision for *manufactures not otherwise provided for, of mixed materials, cotton, &c.* This clause disappeared at the enactment of the Revised Statutes.

However, I am of opinion that the expression *manufactures of cotton* in Schedule A may be construed to include those of *cotton, chief value*. The expression "*manufactures of cotton, of which cotton is the component material of chief value*"

Duty on Mixed Cotton Goods.

may be found in the act of June 6, 1872, allowing 90 per cent. only of existing duties to be exacted in certain cases. That, of course, was pertinent to the *mixed-materials* provision above mentioned. It was kept up, however, in section 2503 of the Revised Statutes, which indicates that Congress intended that the expression *manufactures of cotton* should include that article; for unless it did, there was no provision for *the duty* that was thereby diminished. I say *no provision*, for I assume that Congress did not, in the 90 per cent. provision, *enumerate* articles which were contained in the taxing part of the law only by *assimilation*. If Congress had intended to deduct 10 per cent. from the duty upon articles taxed by assimilation, it seems that it would have indicated as much by referring to them as *so taxed*.

In this connection it may be noticed that the expression above quoted from section 2503 differs materially from the like expression as to silk, &c. As to the latter the conjunction "or" is inserted between the words *silk, &c.*, and the additional clauses. There is no such conjunction as regards *cotton*. This latter expression amounts, then, to a legislative gloss upon the expression *manufactures of cotton* as used in Schedule A, and *translates* it to *include* the article now under consideration.

It of course makes no difference for the purposes of this construction that section 2503 has been repealed. Statutes that have been repealed may be resorted to to throw light upon statutes still in force. Besides, the repealing act (March 3, 1875) indicates afresh an intention in Congress to tax the article before us, by Schedule A.

Upon the whole, I think that the principle in Sussfield's case should be applied to modify the Treasury decision mentioned by you, and to the effect which you suggest.

Very respectfully,

S. F. PHILLIPS,
Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved:

CHAS. DEVENS.

Relative Rank of Assistant Surgeons.

STATE, WAR, AND NAVY DEPARTMENT BUILDING.

The Secretaries of State, War, and Navy have no authority to modify the approval given by them under section 2 of the act of March 3, 1871, chap. 113, of the plans of the building now being erected for the use of those Departments.

DEPARTMENT OF JUSTICE,

December 19, 1879.

SIR: Yours of the 4th instant, addressed to the Attorney-General, inquires whether it be competent for the Secretaries of State, War, and Navy to modify the approval given by them, under the act of March 3, 1871, of the plans of the building now being erected for the use of those Departments; and in that connection you inclose a communication from Colonel Casey, in charge of the building, &c., which calls attention to the modifications required, of which it is only necessary to say here that they are material.

Upon consideration, it seems to me that the power of *approval* intrusted to the Secretaries above named by the act of 1871 (16 Stat., 494) did not continue after its original exercise, which by the terms of the act was to be "before any money is expended under the provisions of this act." It was intended by Congress that the basis for expenditure should be ascertained before any money was expended; and no power was conferred of subsequently changing this. The Secretaries became *functi officio* upon executing the original power; and for *changes* in the plans the legislature was to be consulted.

Very respectfully, your obedient servant,

S. F. PHILLIPS,

Solicitor-General.

The SECRETARY OF WAR.

Approved:

CHAS. DEVENS.

RELATIVE RANK OF ASSISTANT SURGEONS.

The subject of *rank*, as between those holding the office of assistant surgeon in the Army, and what effect, in determining such rank, is to be given to the former service of assistant surgeons who, previously to their appointment, had served three or more years in the volunteer medical department (all of which is discussed in opinions of June 6 and July

Relative Rank of Assistant Surgeons.

2, 1878; see pp. 56, 605, *supra*), reviewed, and the doctrine of those opinions reaffirmed.

In applying section 1219 Rev. Stat. to the case of assistant surgeons who are entitled to rank as captains, it is not necessary to issue commissions to such assistant surgeons as captains. The *office*, to which they are already commissioned, is that of assistant surgeon; and promotion therein (from the rank of first lieutenant to that of captain), consequent upon duration of service, results by mere operation of law, and does not require any action by the appointing power to effect it.

DEPARTMENT OF JUSTICE,
January 24, 1880.

SIR: In considering the question addressed to the Attorney-General in yours of the 25th of November last, I have followed your suggestion to review the general topic therein inclosed, as to the *rank of assistant surgeons*, availing myself, in that connection, of the arguments inclosed with your communication.

You ask whether, in applying section 1219 of the Revised Statutes to the case of assistant surgeons bearing the rank of captain, it be necessary that such surgeons shall be *commissioned* as captains?

This question has arisen in the course of re-arranging the register of assistant surgeons in accordance with an opinion of the Attorney-General, communicated to you upon the 6th of June and 2d of July, 1878. You add that the *rank* of no assistant surgeon now under consideration, and indeed of no one appointed before the year 1874, has been set forth in his commission, such paper merely designating the *office* to which the person was commissioned; since then, however, the form of commission designates as well the *rank* as the *office* in which the person has entered the service.

The opinion above alluded to was, in effect, that by the act of 1866, chap. 297, sec. 17, all persons who previously had been for three years assistant surgeons in the volunteer service, upon being *selected*, as therein provided for, and commissioned as assistant surgeons in the Regular Army, did *instantly* and by mere operation of law take rank as *captain*; and, therefore, that Dr. Campbell, whose case was before you and fulfilled the above conditions, having been commissioned as assistant surgeon in the Regular Army upon the 14th of

Relative Rank of Assistant Surgeons.

October, 1867, was entitled to precedence of all assistant surgeons who at that time did not rank as captains.

The question in Campbell's case was as to *rank*, not *office*, and as to rank *in the staff* to which he belonged, and not as to mere *Army rank*, such, for instance, as officers hold under *brevets*.

It is suggested on behalf of some gentlemen who believe themselves injured by the above opinion that if the distinctions between *office* and *rank*, and between *rank in the staff* to which the officer belongs and general *Army rank*, had been kept in view therein, the conclusion would have been different.

Appreciating the delicacy and value of the interests concerned, I have again carefully considered the provisions of the act of 1866 above referred to. These enlarged the medical staff in the Army, and set apart the *vacancies* thus created in the grade of assistant surgeon for persons to be selected from those who during the late war had served as assistant surgeon of volunteers for two years, adding that persons so *selected* who had so served *during three years* should be eligible to promotion to the grade of captain.

By the law then in force, the grade (to use the word employed in the act of 1866) of assistant surgeon already comprised the two subgrades of lieutenant and captain, distinguished by their respective periods of service, and a previous clause in the section before us had established *three years* as the limit between these periods for assistant surgeons already on the staff. Upon entering the Army from civil life, an assistant surgeon had the rank of lieutenant for three years, and after that, of captain. If he so entered after three years of volunteer service, Congress provided that for attaining to the *grade* of captain that sort of service should be equivalent to *regular* service.

It is now said that the *grade* thus given is what is known as mere *Army rank*, and does not confer precedence within the staff over assistant surgeons of older dates of appointment therein, even if only *lieutenants*. The suggestion is that Congress did not intend to dislocate an order of precedence amongst assistant surgeons which had been already fixed by proficiency at examination and length of service. The position given by proficiency is of course only amongst those of

Relative Rank of Assistant Surgeons.

the same class and length of standing. Length of service is an element in *precedence* that overrides proficiency. He who had served for ten years had precedence of him who had done so for only nine, without regard to their comparative proficiency. The only new question arising upon the proposed introduction of three years' assistant surgeons of volunteers into the regular staff was whether such length of service should for all purposes give precedence over a less term of service *on the regular staff*. That was a question which Congress alone was competent to decide. Whether, upon a necessary enlargement of the *regular* medical staff, three years of risk, fatigue, responsibility, anxiety, and successful administration in field and hospital as a volunteer surgeon might not warrant the legislature in engrafting upon such staff those who had undergone it, and in assigning to them precedence therein over all those whose like experience as regular surgeons had been for a shorter term, was certainly a question of mere legislative discretion. I see nothing in the terms employed by the act to place any restriction upon the superior *grade* which it expressly assigns. Nor is there any evidence that it ascribes less merit to the three years' service of which those newly introduced were allowed to avail themselves than of that other three years' service by which earlier members of the staff were to be promoted. In the absence of such evidence it is to be assumed that the same merit was ascribed to both sorts of three years' service, and the same consequences to both; that is, amongst others, the consequences of precedence *within the staff* (the particular point in question) over all officers of a shorter term of service, regular or volunteer.

Upon reconsideration, I do not find that the opinion in Dr. Campbell's case is chargeable with inadvertency as to the distinctions between *office* and *rank*, or as to the two sorts of rank above mentioned. The word *grade*, used in the same clause in the act of 1866 to designate indiscriminately, first, an *office*, and then a *rank*, does not *signify* "office" in its first employment and "rank" in the second, but refers to a quality which may be common to both, viz, that of conferring relative superiority of position. The place of assistant surgeon is a *step* in promotion; so is that of captain on the medical

Relative Rank of Assistant Surgeons.

staff. They are not steps as regards each other. The latter is a step within the former, a *subgrade*. It is a step above another subgrade. Those who have been advanced to it *stand above* those who have not been; and such seems to have been plainly the intention of the legislature herein.

I may now answer the particular question which you ask.

I think it unnecessary, in applying section 1219 as above indicated, to issue *commissions* to assistant surgeons upon their passing from the grade of lieutenant to that of captain. I observe the report of Senator Burnside, which you inclose, and the terms of the Senate resolution that followed; and I see no reason for questioning a conclusion therein announced, viz, that the grades of lieutenant and captain incident to that of assistant surgeon are not *offices*. The *office* for which in these cases the President issues a commission is that of *assistant surgeon*; and the subordinate steps within that office, whether many, indicated by *numbers*, or *one*, indicated by a *word* which carries increase of pay, emoluments, and *military* rank, take effect at once, by mere operation of law.

I observe that under like circumstances certain officers of the Navy receive a new commission for every *grade* which they attain (Rev. Stats., sec. 1480). This is by an express statute that is limited to the cases named therein. Although it would require but a slight recognition to that effect by Congress to "develop" these grades into separate *offices*, this has not been done as yet; and in the meantime the absence of a statutory provision like that in section 1480 is significant.

Very respectfully, your obedient servant,

S. F. PHILLIPS.

The SECRETARY OF WAR.

Approved:

CHAS. DEVENS.

NOTE.—In connection with the subject discussed in the foregoing opinion, see Winthrop's Digest, title "Assistant Surgeon," page 122; also, remarks on page 108, par. 7.

Case of Chief Constructor Easby.

CASE OF CHIEF CONSTRUCTOR EASBY.

On April 30, 1877, during a recess of the Senate, E. was appointed by the President to the office of Chief of the Bureau of Construction and Repair in the Navy Department to fill a vacancy, his commission to expire at the end of the next session of the Senate. At the next session (extra) of the Senate, in October, 1877, he was nominated by the President to that body for said office, under section 421 Rev. Stat., for the term of four years. The nomination was not acted upon during such session, which ended December 3, 1877, and the office became again vacant. At the session of the Senate which immediately ensued, E. was again nominated by the President to date "from April 28, 1877," and the nomination was confirmed in the same terms on April 15, 1878. *Held* that, notwithstanding the special wording of the nomination to, and confirmation by, the Senate, the term of office of the appointee, E., as prescribed by section 421 Rev. Stat., must be deemed to begin from the date of his appointment (namely, in April, 1878), and not "from April, 28, 1877," the date specified in the nomination.

DEPARTMENT OF JUSTICE,

January 27, 1880.

SIR: In reply to yours of the 7th instant, addressed to the Attorney-General, I have to say that upon consideration of the case of Chief Constructor Easby, therein mentioned, I concur in your opinion that his term of office begins at the date of his appointment by and with the consent of the Senate, and not at the date of his previous temporary appointment by the President, notwithstanding the special wording of his nomination to the Senate, and of his commission.

It seems that Mr. Easby was first appointed to the place above mentioned on the 30th of April, 1877, in order to fill a vacancy. This was by the President alone, the Senate not being in session. At the next session (extra) of the Senate, October 15, 1877, he was nominated to such office. This nomination was not acted upon, so that at the end of the session (December 3, 1877) the office became again vacant. During the next regular session Mr. Easby was again nominated "from April 28, 1877," and this nomination was confirmed on the 15th day of April, 1878, in the same retrospective terms. Both the temporary and the regular commissions issued to Mr. Easby conform to the above wording of that nomination and confirmation.

The fiction familiar to lawyers under the phrase *nunc pro*

 Post-Trader—License Tax.

tunc has no application in cases of appointments to office. Such executive action cannot, in the nature of things, operate *by relation*. Especially must that be so where, as here, the office, *during one portion of the very time* to which the regular appointment and commission are made to relate, had been occupied by the appointee under *another* competent appointment and commission, and *during a second portion* had been occupied by *others* in due course of law.

The law of the term of the office, of course, controls special language in the nomination and confirmation. Sec 421 of the Revised Statutes makes the term of chief constructor one of four years from the appointment with the consent of the Senate (2 Opin., 333 and 338). The term during which Mr. Easby served under the temporary appointment was, *by law*, a different term from that which commenced in April, 1878 (1 How., 250).

The two commissions are herewith returned as requested.

Very respectfully, your obedient servant,

S. F. PHILLIPS,

Solicitor-General.

THE SECRETARY OF THE NAVY.

Approved:

CHAS. DEVENS.

 POST-TRADER—LICENSE TAX.

A post-trader, located upon a Government reservation at a military post, within the boundaries of a Territory, cannot, because of the location of his business, claim exemption from the payment of a license tax imposed by the Territorial authorities, where his business extends to other than military persons. But where his business is confined to persons in the military service, it is not competent for the Territorial authorities to subject him to the payment of such tax.

DEPARTMENT OF JUSTICE,

February 2, 1880.

SIR: Yours of the 26th ultimo, addressed to the Attorney-General, asks whether the authorities of Lawrence County, Dakota, have a right to compel one Fanshawe, post-trader at Fort Meade, in such Territory, to take out a county license for the sale of liquor, the place of sale being upon a Government reservation within said county.

TAX ON POST-TRADERS.

From the form of your note I gather that the only objection to such tax is because of the location of the place of business. If so, I am of opinion that the tax is valid.

In this I assume that Fanshawe is trading not only with military persons, *but with citizens*. If his sales were limited to the former, it would not be competent for the county authorities to levy a tax upon him; for post-traders so far are, very clearly, a part of the machinery of the United States Government—instruments by which it supplies to soldiers at remote stations many articles which cannot well be provided by the Regular Army bureaus, but which, nevertheless, are necessary to their comfort and health, and, therefore, to the efficiency of the Army. This business then, if strictly confined within the limits of the Army, is upon general principles not taxable by State, Territorial, or county authorities.

But such immunity does not protect the same business when extended to customers other than military persons. In that case the reason for immunity fails and with it the immunity itself.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Solicitor-General.

The SECRETARY OF WAR.

Approved:

CHAS. DEVENS.

TAX ON POST-TRADERS.

Post-traders at military posts, appointed under section 3 of the act of July 24, 1876, chap. 226, are by that section made subject to the regulations of the Army applicable to the occupation or business carried on by them, in like manner, and to the same extent, that sutlers formerly were with respect to the same business or occupation. *Held*, accordingly, that a tax of five cents for each soldier at the post, imposed by the council of administration upon the post-trader at Fort Dodge, Kansas, is in accordance with law.

DEPARTMENT OF JUSTICE,
February 2, 1880.

SIR: In reply to yours of the 26th ultimo, addressed to the Attorney-General, and inquiring into the legality of the

Tax on Post-Traders.

tax of five cents for every soldier at the post, imposed by the council of administration upon Wright and Langton, post-traders at Fort Dodge, Kansas, I submit that in my opinion such tax is in accordance with law.

By article 198 of the Army Regulations (ed. 1863) a like tax is authorized in terms as regards post-*sutlers*. This office, however, was abolished, and its duties transferred to the Subsistence Department of the Army, by the act of 1866, chap. 299, sec. 25. Ten years later, by the act of 1876, chap. 226, sec. 3, it was provided "that every military post may have one trader, to be appointed by the Secretary of War, on the recommendation of the council of administration approved by the commanding officer, who shall be subjected in all respects to the rules and regulations for the government of the Army." In the mean time the above rules have remained continuously in existence. They were not *repealed* by the act which abolished the occupation upon which they operated. That statute merely rendered them inoperative for want of subject-matter. But they continued in force so far as that if *sutlers* had again been authorized in terms, they would without more said at once have become applicable for their government.

Referring to the circumstance that the business of post-traders and post-*sutlers* must be very much the same, and that the necessity which has always existed for formal regulations of the latter business must attend as well the former, there might be reason, even in the absence of an express statutory provision upon the point, to believe that Army regulations which applied to *sutlers*, upon a mere change of the name to *traders*, would still be operative; it being obviously the *occupation* and *peculiar relation*, and not the name of the office, that suggested the rules in question. 1

It is, however, unnecessary to pursue this point, for the above quoted act of 1876 expressly makes post-traders subject in all respects to the Army regulations. It seems that by this Congress must have meant especially to refer to those regulations which applied to the *occupation* so authorized; i. e., that the post council might prescribe the sort of stock to be kept on hand, fix a tariff of prices, verify weights and

Duty on Cut Hoops.

measures, and require the trader to pay a tax to the post fund.

It seems to me that whatever objection there may be to subjecting civilians to Army regulations in time of peace is not relevant to a case where the civilian has voluntarily assumed the position to which a statute attaches such subjection—at all events so far as such regulations levy a petty tax for the support of camp charities.

I have attentively considered the opinion given in this case by the learned Judge-Advocate-General, with which you have favored me; but, after allowing it all the weight due to his special skill in this branch of the profession, I am unable to concur therein.

Very respectfully, your obedient servant,

S. F. PHILLIPS,

Solicitor-General.

The SECRETARY OF WAR.

Approved :

CHAS. DEVENS.

DUTY ON CUT HOOPS.

The proper rate of duty chargeable upon "cut hoops," under section 3 of the act of June 30, 1864, chap. 171 (sec. 2504 Rev. Stat.; act of March 3, 1875, chap. 127, sec. 4), considered.

DEPARTMENT OF JUSTICE,

March 5, 1880.

SIR : In yours of the 9th ultimo, addressed to the Attorney-General, a question is asked as to the proper rate of duty to be imposed upon "cut hoops," under the act of 1864, chap. 171, sec. 3 (Rev. Stats., sec. 2504; act of 1875, chap. 127, sec. 4).

"Cut hoops" are not mentioned in that act by name. They are supposed to be included in "hoop-iron," which is so mentioned, or at least in the expression "manufactures and articles of iron not otherwise provided for." The question is whether under the former or the latter—the duty upon "hoop-iron"

Duty on Cut Hoops.

being *specific* and at present prices higher than the duty (ad valorem) imposed upon "manufactures," &c.

From 1868 to 1878 the Treasury Department treated "cut hoops" as being "hoop-iron," but because in the latter year an importer who had brought suit in New York against the collector recovered judgment for the excess of duty exacted beyond ad valorem rate, from which judgment the Acting Attorney-General, upon receiving from you a copy of a letter from the district attorney for southern New York, advising that *no error* had occurred, certified that no writ of error should be prosecuted, the rule was changed, and since then "cut hoops" have been treated as "manufactures of iron not otherwise provided for."

Recently application has been made to you for a restoration of the former ruling. Thereupon a record of the testimony given in the case decided in 1878 (Leng's) is transmitted to this Department, together with other papers bearing upon the general subject, and an opinion asked upon the question above stated.

Two positions have been assumed in the argument here on behalf of the application pending before you, as follows:

1. Admitting all that those who contend for an ad valorem duty claim as regards the distinction between *hoop-iron* and *cut hoops*, it is a distinction without a difference, and cannot affect the interpretation of the act of 1864.

2. Admitting that there was no technical *error* in the administration of *Leng's* case, still there was an evident miscarriage, so that it ought not to affect the rule of action theretofore adopted by the Department of the Treasury.

1. The first of the above admissions is, in effect, that at the time of the passage of the act of 1864 *hoop-iron*, in American commercial language, meant only such iron intended for hooping barrels and like vessels as was put upon the market in bundles weighing either 56 or 112 pounds each, the iron being from 25 to 100 feet in length and doubled up into convenient sizes for bundling; whilst *cut hoops* differed therefrom in being cut to lengths suitable for barrels, &c., and also punched at the ends with holes for fastening.

It is said that the above operation of cutting and punching

Duty on Cut Hoops.

is not *manufacture* and does not introduce any *specific* difference between the previous *hoop-iron* and the subsequent *cut hoops*.

I have considered this question in the light of the authorities cited upon either side. It is an interesting one, never yet decided, and may well be presented and pressed to a decision by the Supreme Court. The case of *cut hoops* is one of great importance to the revenue. The existing rule as to duty thereupon is anomalous, because, however well-founded it may be *technically*, it seems clearly contradictory to the general principle of discrimination adopted by the act of 1864, and attributable to a legislative inadvertency only.

Upon a proper occasion I will give instructions that the question of law above raised be placed in such a shape as to obtain a ruling of the Supreme Court thereupon.

2. Upon the second proposition I am of opinion that the verdict in Leng's case is not satisfactory for the purpose of establishing a principle. Judge Woodruff, who presided at the trial, administered the law not unfavorably to the interests of the United States, and he having died shortly afterwards, Judge Blatchford, upon a perusal of the record, did not think it to be his duty to set the verdict aside, as against the evidence.

The evidence produced to show that in 1864 *hoop-iron* and *cut hoops* were known in American commercial language as different things was but slight, and was met by contradictory evidence.

It is not necessary to examine it in detail. I think that it appears upon inspection that, however true it may be that no technical *error* was committed upon the trial, the result carried with it but little presumption against the correctness of the previous contrary action of the Department of the Treasury.

As a matter of course, I do not understand you as asking my opinion whether upon *another* trial it is probable that the ruling in Leng's case (and substantially in the cotton-tie case) will be reversed. That depends to some extent upon the view to be taken of the actual state of the facts which underlie the controversy, which it may be has never yet been fully presented to a jury.

Bond Deposit of National Banks.

I believe that the above observations cover all the matters of law that are suggested in your communication.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved :

CHAS. DEVENS.

BOND DEPOSIT OF NATIONAL BANKS.

The provision in section 4 of the act of June 30, 1874, chap. 343, viz, "That the amount of the bonds on deposit for circulation shall not be reduced below \$50,000," is for all purposes connected therewith repugnant to the previous statutory provision (secs. 5159 and 5160 Rev. Stat.) requiring national banks to have and maintain with the Treasurer of the United States a bond deposit to the amount of one-third of their capital stock, and so far in effect does away with such provision. Purpose of said act of June 30, 1874, explained.

DEPARTMENT OF JUSTICE.

April 30, 1880.

SIR: Yours of the 5th instant, addressed to the Attorney-General, asks whether the fourth section of the act of June 30, 1874 (18 Stat., 124), which provides that the amount of bonds required to be deposited with the Treasurer of the United States by national banks *shall not be reduced below \$50,000*, is for all purposes connected therewith repugnant to the previous statutory provision (Rev. Stat., §§ 5159, 5160) that such banks shall at all times keep on deposit with the Treasurer bonds *to the amount of at least one-third of their capital stock*.

Upon consideration, I answer in the affirmative.

A principal purpose of the act of 1874, as shown by its title, was to redistribute the national bank currency. In this respect it revises and amends the provisions for the same end contained in section 6 of the act of 1870, chap. 252 (16 Stat., 253). These provisions were, in substance, that \$25,000,000 of circulation should be withdrawn from banks in those States which had more than their share of circulation, and be transferred to like institutions in States having less than their

Bond Deposit of National Banks.

share. The method of withdrawal was, that the Comptroller of the Currency should begin by making requisitions upon such banks as had a circulation exceeding \$1,000,000, until reduced to that amount; and then should proceed in the same way with banks having a circulation exceeding \$300,000. If any bank failed to respond to such requisition, the Comptroller was to sell at public auction "an amount of bonds deposited by such association as security for said circulation equal to the circulation to be withdrawn from said association," and with the proceeds reduce the notes of the association to the amount required.

It seems plain that the legislature had given its attention to the manner in which this plan would operate, and was aware that the bond deposit of each of the twenty banks then having a circulation of over \$300,000 and liable to requisition would be reduced to about *one-sixth*, instead of one-third, of its capital stock. An extract from the books of the Comptroller of the Currency with which I have been furnished shows this to have been the condition of things at that time, and the peculiar character of the legislation renders it most improbable that Congress was not cognizant thereof.

It is a matter of no importance in this connection that the provisions of the above section were never carried into effect. What is important to consider is, the theory upon which it was enacted. These provisions remained in force for four years, failing within that time of practical effect because of a decision, immaterial here, as to the operation of a *proviso* appended.

By the above act of 1874, the legislature expressly repealed this *proviso*, and increased the amount of circulation to be withdrawn to \$55,000,000. The other details of section 6 of the act of 1870 were substantially retained, requisitions were to be made upon the same classes of banks in the same order and to the same extent, and failure to respond was to lead to the same method of compulsion. (See secs. 7 and 8.)

Another extract from the books of the Comptroller shows that the details of the operation of these provisions would have been very much the same with those of the act of 1870. They are subject, therefore, to the remarks just made above, with the addition that the scrutiny which the previous statute

Bond Deposit of National Banks.

must in the mean time have undergone shows that the change of policy as to the bond deposit in the classes of banks affected was *deliberate*.

But in addition to the above provisions, the act of 1874 contained another, intended to *facilitate* (see Rev. Stat., sec. 5160) the voluntary reduction of national bank circulation. It was as follows:

"Any association organized under this act, or any of the acts of which this is an amendment, desiring to withdraw its circulating notes, in whole or in part, may, upon the deposit of lawful money with the Treasurer of the United States in sums of not less than nine thousand dollars, take up the bonds which said association has on deposit with the Treasurer for the security of such circulating notes; which bonds shall be assigned to the bank in the manner specified in the nineteenth section of the national bank act; and the outstanding notes of said association to an amount equal to the legal-tender notes deposited shall be redeemed at the Treasury of the United States, and destroyed as now provided by law: *Provided*, That the amount of the bonds on deposit for circulation shall not be reduced below fifty thousand dollars."

It is upon this section that the question under consideration has arisen. In the light of what has already been said, that question is, whether the legislature, which in the same act treats the bond deposits of a class of banks, not separated from the ones under consideration by anything material to this discussion, as important only in *securing circulation*, and disregards the original policy of maintaining a constant proportion between that deposit and the bank *capital*, irrespective of circulation, does not in like manner disregard that policy in the section above quoted.

The state of the argument upon this point may be summed up thus: Section 4 of the act of 1874 taken alone indicates that the legislature intended to allow national banks to reduce their bond deposit to \$50,000 *absolutely*. However, when read in connection with section 5160 of the Revised Statutes there appears to be no absolute repugnancy betwixt the two, and it may be that by this latter provision the legislature intended to provide only that *in no class* of national banks (*ex. gr.*, that with capital less than \$150,000) should the deposit

Bond Deposit of National Banks.

be reduced below \$50,000, leaving section 5160 still to cover the class of banks having a larger capital than that; in other words, that the reduction authorized by the body of section 4 is a reduction only so far as the deposit might be required to secure *circulation*, and leaves the claim of *capital stock* to a rate of deposit untouched. The reply is, that in other important and deliberate features of the act the legislature treated the one-third policy as no longer existing, and even *compelled* certain banks to reduce their bond deposit below that proportion.

I may add that it is significant of the understanding of the legislature in 1870 and 1874 as to the purpose of this bond deposit by national banks—a purpose, I believe, nowhere *specifically* defined—that in both of the acts it is referred to as *security* for *circulation*. This, I think, confirms the theory that in both acts the reduction of circulation was to be made the exact measure of the reduction of the deposit. To the same purpose is the hint given by the “*nine thousand dollars*” specified in the section quoted above from the act of 1874. That *hint* (which has always been acted upon by the Treasury Department) is that the *whole amount* of the deposit made in exchange for such circulation, and not merely an equal amount thereof, is to be returned upon a surrender of the corresponding circulation. This goes to show that the legislature did not regard the *ten* or other per cent. of deposit, beyond the amount of circulation, as of any practical value to the creditors, other than bank-note holders, and, therefore, that when these were otherwise secured there was no occasion for its retention.

Upon the whole, I am of opinion that, taken with its context, section 4 of the act of 1874 is, for all purposes connected therewith, repugnant to section 5160 of the Revised Statutes, and all other previous legislation that requires national banks to have and maintain in the Treasury of the United States a bond deposit to the amount of one-third of their capital.

There is enough in the case to render that official vigilance, which has raised and made it necessary to decide the question, highly commendable; but even if the question were more doubtful, great weight would have to be attributed to the contemporaneous understanding by all practically concerned

Tax on Distilled Spirits—Leakage.

as to the operation of the provision before me, in consequence of which, without demur from any one, the provisions of section 5160 have been disregarded by many officials and other citizens of more than ordinary intelligence and character in immense transactions occurring from day to day during more than five years.

Very respectfully,

S. F. PHILLIPS,
Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved:

CHAS. DEVENS.

TAX ON DISTILLED SPIRITS—LEAKAGE.

In the winter of 1866-'67, R. purchased a large quantity (1,777 barrels) of distilled spirits in bond, which were not withdrawn from warehouse until May, 1869. Upon their withdrawal therefrom the internal-revenue tax was exacted on the whole quantity originally deposited in the warehouse, without allowance for leakage (which amounted to about 13,000 gallons) whilst there. R. subsequently made application to the Commissioner of Internal Revenue, under section 3220 Rev. Stat., for repayment of so much of the tax which was exacted as covered the amount of spirits lost by warehouse leakage, claiming that to this extent such tax was "wrongfully collected." *Held* that under the provisions of the internal-revenue laws in force at the time (acts of July 13, 1866, chap. 184, and July 20, 1868, chap. 186) the tax was chargeable upon spirits in warehouse according to the quantity originally deposited therein, without regard to leakage, and that, the tax in the above case upon the whole quantity originally deposited being therefore exacted *pursuant to law*, there was in the collection thereof "nothing wrongful" within the meaning of section 3220 Rev. Stat., and accordingly the case is not one wherein the Commissioner is authorized by that section to refund.

DEPARTMENT OF JUSTICE,
May 5, 1880.

SIR: I beg your attention to a reply to yours of the 2d of December last, addressed to the Attorney-General, asking a question as to the taxation of *leakage*, in connection with the case of R. C. Ridgeway, depending before you.

It seems that Ridgeway in the winter of 1866-'67 purchased a large amount (1,777 barrels) of spirits *in bond*, and that they

Tax on Distilled Spirits—Leakage.

were not withdrawn until May, 1869; that upon such withdrawal tax was exacted upon the whole amount originally deposited, without allowance for leakage (about 13,000 gallons) occurring in the warehouse; and that application for repayment of the same has been duly made to the Commissioner of Internal Revenue under section 3220 of the Revised Statutes, it being suggested on behalf of the claimant that the above exaction, if not illegal, was at least *wrongful*, within the meaning of that section.

Section 3220, so far as important here, is in these words: "*The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized, on appeal to him made, to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected.*"

Under these circumstances you ask "whether taxes on distilled spirits which have been lost by leakage while stored in a bonded warehouse can be either legally or equitably refunded, in whole or in part, under the authority conferred by section 3220 of the Revised Statutes."

So much of section 3220 above quoted as is underscored (*italicised*) was first enacted in 1863 (chap. 74, sec. 31), the remainder having been added in 1864 (chap. 173, sec. 44). It is therefore argued that the word *wrongfully* therein contained carries the jurisdiction of the Commissioner for refunding taxes *further* than the word *illegally*, the former having, as is said, been added purposely, in order to confer upon the Commissioner power to refund in certain *hard* cases where, strictly speaking, the tax is *legal*.

I cannot agree to this suggestion.

To all officers who are required to administer law the word *wrongful* implies something *contrary to law*; and equally, to them, nothing that the law commands can be *wrongful*. I am not speaking of speculative views which, as citizens, such persons are at liberty to indulge, but of the rule of their action in office, which is the matter in hand here. Congress, therefore, did not, by the words added as above in 1864, intend to confer upon the Commissioner power to dispense with *law*

Tax on Distilled Spirits—Leakage.

in cases where in his view (as a citizen) its enforcement might work *wrong*, in the general sense of that word.

Indeed, it seems plain that Congress could not do this. What was meant was probably to indicate, even at the risk of tautology, that the Commissioner was to give a fair and liberal construction to claims founded upon alleged illegal exactions. The internal-revenue system was new and elaborate, and in such cases where the constituting act is to become a sort of *manual* to guide rapid and important action by officials engrossed in public business, &c., I believe it to be not uncommon for the legislature to be somewhat redundant in its directions.

Another suggestion by the claimant, preliminary to the chief matter for consideration, is, that inasmuch as he brought these spirits *in bond* after the then Commissioner had announced that *leakage* would be allowed, and inasmuch as he continued to expose them to leakage for more than two years under a uniform train of like decisions maintained until within a few weeks of the time of withdrawal, therefore, even conceding that the letter of the statute imposed a tax upon *leakage*, yet, under the principle of estoppel in pais, this could not be exacted here.

To this view there are three objections: (1) that the doctrine of estoppel does not extend, even as between citizens, to matters of *law*; *ex. gr.*, as here, to the construction of a public statute; (2) that the claimant does not show (which is essential) that his action in retaining the spirits in bond was brought about by the rulings referred to, for it may well be that he would have decided it to be to his interest so to retain them, even if he should have to account for leakage; and (3) that the United States are never estopped by *laches* upon the part of their officers.

It is true that great respect is due to a uniform practical administration of statutes like those before me. This case, however, depends very little upon that principle, for it is one in which the Department itself had reversed its own previous rule of action, and which therefore presents the question whether the Department can be compelled to return to that rule. This leaves the matter at large; for certainly such a re-

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turn cannot be advised unless the earlier rule was according to law.

The question is therefore narrowed down to an inquiry whether the above exaction was *illegal* in any fair sense of that word; in other words, did the act of 1866, ch. 184, impose tax upon warehouse spirits according to the amount originally deposited without regard to *leakage*, or, in effect, only upon the amount which in the end was actually withdrawn?

I refer the inquiry to the act of 1866 alone, for although the act of 1868, chap. 186, gave the rule for the rate of taxation at the time of the exaction in question, yet I understand it to have operated, as to spirits previously distilled, only upon such as were previously liable to taxation; in other words, that it did not *originate* a tax upon spirits that at the time when it went into operation were no longer in existence, without *fault* of their owners, &c.

Before considering the act of 1866 in the present connection, it will be serviceable to take a glance at the previous legislation which taxed domestic distilled spirits, contained substantially in the acts of 1862, chap. 119, and 1864, chap. 173.

The act of 1862 created the warehouse system in relation to internal revenue. Inasmuch, however, as the spirits upon which it levied tax were only those “distilled *and sold*, or *removed for consumption or sale*,” it is obvious that the question of warehouse leakage was excluded; in other words, such leakage was not allowed *as a specific effect to some amount previously ascertained to be due prima facie*, for no tax could be fixed until the quantity of spirits actually sold or removed into private hands had been determined—a process which of course left out of the account all honest loss of spirits while in the hands of the Government.

The words of the act of 1864 were herein substantially the same as those of the act of 1862.

The word *leakage* occurs in the course of this internal-revenue legislation first, I believe, in the act of 1863, chap. 74, sec. 12. It has already been seen that one of the events upon which the tax upon spirits was to be ascertained was their removal *for sale*. Inasmuch as this removal might involve considerable transportation and consequent leakage *after* such ascertainment, the act of 1863 authorized the Commissioner

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of Internal Revenue to make rules for, certain deductions on that account, to be allowed by anticipation, as I understand it, at the time of removal.

But for this express anticipation, such rules would of course have been invalid, whilst on the other hand regulations of *warehouse* leakage under the acts of 1862 and 1864, as we have seen, would have been superfluous.

I will add that under both of the last-named statutes the tax was secured by a *lien* upon the distillery, stills, &c., and real estate, and that it was not until the act of 1865, chap. 78, sec. 1, that this lien was extended to *the spirits* themselves.

There is a striking difference betwixt the provisions above referred to and those of 1866 upon the same matter. The description of the subject-matter of taxation is changed, as well as the definition of the incidental lien. All reference to *sale* or *removal* as required to ascertain the article liable to taxation is dropped, and the lien is made to relate to the *time of distillation*. The object to be taxed is described as "all distilled spirits upon which no tax has been paid according to law," and it is immediately added that "the tax shall be a lien on the spirits distilled * * * from the time said spirits are distilled until the said tax shall be paid."

It seems to be plain that these words impose the tax referred to upon the article "distilled spirits" so soon as they come into existence, or if there be a context providing for an early official inspection and determination of the quantity and quality thereof, then at the time of such determination, as being practically the first ascertainment of that existence. I submit that the language which carries the tax lien back to the time of distillation corresponds with this conclusion. It is true that a lien may secure a debt before it has been liquidated, but here the clause defining the lien seems to emphasize the *similar language* which defines the debt; "similar language" which at the same time, as I have just said, is made impressive to like effect by the form of the clauses *in pari materia* in previous statutes as above mentioned. The only distinction that occurs to me as existing betwixt these expressions is that the one which relates to *the tax* reasonably admits of, perhaps suggests, the existence

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of a subsequent modification by some context upon the same point, whilst the one which relates to the lien is final. That *context* is the provision for inspection, gauging, proving, and package-marking upon *the third day* after the distillation (sec. 34).

However, what appears certain and practically important in the present case is that the act of 1866 *prima facie* levied an ascertained tax upon distilled spirits previously to their entry into a warehouse, and that in this respect it differed entirely from the legislation which preceded it, which referred such ascertainment in general to the time of withdrawal.

It follows that if leakage be allowable under the act of 1866, it must be because of express language to that effect which modifies the *prima facie* case just mentioned. Consequently, those who claim an allowance for warehouse leakage under that act are under a necessity of showing positive provisions therein to that effect, which necessity did not exist as to the acts of 1862 and 1864.

I have considered this matter with great care, and am unable to find such provisions. Section 40 speaks of losses in bulk, it is true, but those are either *leakage* during transportation, or deficiency in consequence of removal for rectification. (1) In speaking of the former it is said that the tax upon spirits removed from one bonded warehouse to another shall, upon arrival at the latter, be paid on any difference in amount between what was withdrawn and what arrives at its destination, "less the allowance for leakage as established by the regulations of the Commissioner of Internal Revenue." It seems to me that this clause refers to rates of allowance *then* "established," viz, to those authorized upon transportation for sale by the act of 1863, above cited, and not to any then *to be* established. The language in which regulations authorized in a previous clause of the same section are described, viz, those which the Commissioner, &c., *may prescribe*, is to the same effect. (2) The connection in which losses during removal for rectification (preliminary to exportation) are mentioned in section 40 confirms the view that warehouse leakage is not admissible under the act of 1866; for after allowing such deficiency upon the return of the

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rectified spirits to the warehouse, it is provided that if they shall afterwards be withdrawn for consumption or sale, the duty upon the deficiency so previously allowed shall be paid. The principle which underlies this provision for refunding is somewhat variant from that allowing warehouse leakage, and is plainly contradictory to one which is asserted for the claimant, in that taxation is levied upon articles, not as existent, but when about to be consumed.

Another provision in section 40 is also relied upon by the claimant, viz, that "any distilled spirits entered in a general bonded warehouse shall be subject to such rules and regulations as the Commissioner of Internal Revenue shall prescribe." It is said that this clause gave the Commissioner power to prescribe a rule allowing warehouse leakage, and therefore lent effect to the rulings cited as to such allowance, during the whole time that the acts of 1866 and 1867 were in force, and so, as above admitted, withdrew the leakage in question from the operation of the act of 1868.

But *regulations* have no force to *alter* the statutes which authorize them. The present seems to be another illustration of this principle, of late so often asserted by the courts. I am not now considering whether and how far the statute recognized regulations upon leakage then existing. The question here is, whether in the absence of such existing regulations a statute which imposed a tax upon "all distilled spirits" and constituted it a lien upon such spirits "from the time said spirits are distilled," by a provision for *regulations* of such spirits whilst in a warehouse, authorized in effect the Commissioner to re-enact statutes which imposed the tax upon spirits "distilled and sold," &c. I think not. In other words, I understand that such regulations make no *context* to alter the interpretation of the body of the act of 1866.

I need only sum up my opinion that the tax now complained of was authorized by the statutes in force when it was exacted.

It is somewhat singular that such a question should have arisen, *i. e.*, that the words of the statute should have been sufficiently obscure to permit it; for there were abundant precedents of legislation upon the subject. In Great Britain

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the earliest statutes upon revenue warehouses, going upon the idea that they were a means for making the tax secure whilst *time* was given to the debtors, and therefore were incidental to a benefit to the latter alone, required the tax to be *ascertained* at entry, and paid without allowance at withdrawal. Subsequently a different policy sprang up, and, after repeated and increasing statutory modifications, acts passed in 1864 (internal revenue) and 1876 (customs) make full allowance for leakage in spirits and similar articles. In the United States the earliest warehousing act (1846, chap. 84) required the duties to be “ascertained on the entry thereof for warehousing,” and to be secured by bond. Accordingly, a regulation (February 17, 1849) declared that no allowance should be made for leakage, &c.; and upon a recasting of the act of 1846 (1854, chap. 30) such regulation was substanti-ally incorporated therein and has been continued in force ever since (Rev. Stat., sec. 2983). Inasmuch as the internal revenue law of 1868, chap. 186, is very precise in excluding allowance for leakage, it appears that progress upon this topic in the United States has been the reverse of that in Great Britain.

It occurs to me to add in connection with the act of 1868, that the provision therein (sec. 4) that “the tax [50 cents per gallon] *shall attach to this substance* [ethyl, alcohol, &c.] *as soon as it is in existence as such*, whether it be subsequently separated as pure or impure spirit, or be immediately, or at any subsequent time, transferred into any other substance,” which is generally relied upon as excluding all allowance for leakage, is no stronger to that effect, *for a case like the present, where distilled spirits* (“pure or impure spirit”) *were actually created*, than are the words of the act of 1866 above quoted, which attach the tax as a lien upon the spirits *from the time that they are distilled*. The latter words are as effective from the time of distillation of spirit as the other from that anterior time when ethyl alcohol is in existence; and equally they exclude *leakage*, or, rather, require a positive context for its allowance. In the act of 1866, there is no such context, whilst in the act of 1868 there is a positive provision (sec. 13, bond) which even in the absence of the previous one would exclude

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leakage. However, as regards their primary provisions in relation to the tax, both acts stand upon the same footing.

Very respectfully, your obedient servant,
 S. F. PHILLIPS,
Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved :

CHAS. DEVENS.

VOLUNTEER ENLISTMENTS FOR DURING THE WAR.

The men composing a certain volunteer regiment had, in December, 1863, been enlisted "for three years or during the war." In June, 1865, the regiment was ordered to New Mexico to quell an Indian outbreak, and while *en route*, during that and the following month, about two hundred of the men deserted, and did not return. In connection with these facts the following questions have arisen: 1, whether the retention of the regiment in service until March, 1866, was legal; 2, whether or not, under the terms of their enlistment, the men could be ordered to quell the outbreak mentioned; 3, whether or not the men who deserted committed, in point of law, the offense of desertion. Upon consideration: *Held* (1) that the term of service of the said regiment covered the months of June and July, 1865, and its retention in service until March, 1866, was legal, the war not having ended until August 20, 1866; (2) that the point at which, and the forces against which, the regiment might be called upon to serve during the war were matters exclusively for the political and military authorities of the Government to pass upon, and hence the order sending the regiment to New Mexico to quell the Indian outbreak was legal; (3) that the men who deserted as aforesaid thereby committed in point of law the offense of desertion.

DEPARTMENT OF JUSTICE,
 May 6, 1880.

SIR: Yours of the 22d ultimo, addressed to the Attorney-General, states a case concerning "certain men of the First Michigan Cavalry, who re-enlisted as veteran volunteers in December, 1863, for three years or during the war. In June, 1865, the regiment was ordered to New Mexico, to quell an Indian outbreak, and while *en route* some two hundred of the men deserted, at Fort Leavenworth, Kansas, in June and July, 1865, and did not return."

Then, after presenting extracts from opinions upon that

Volunteer Enlistments for During the War.

case by the Judge-Advocate-General and the Adjutant-General, you proceed as follows:

"Inviting your attention to the opinions of the Judge-Advocate-General and the Adjutant-General, I have the honor to request your opinion upon the questions at issue, viz:

"1st. Whether the retention of this regiment in service until March, 1866, was legal?

"2d. Whether or not, under the terms of their enlistment contract, they could be ordered to New Mexico to quell an Indian outbreak in June, 1865?

"3d. Whether or not the offense committed by these men was in fact desertion?"

The time at which the objects of any war have been so attained and secured as to justify its being ended is a question for the political department of the Government exclusively. No other department, and *a fortiori* no citizen or soldier, or number of such, has any faculty for deciding that question for the public or for themselves. The case of *The Protector* (12 Wall., 700) recognizes this principle, and, referring to the proclamation of the President to that effect, ascertains that the late war closed on the 20th of August, 1866. There can be no doubt, therefore, that in point of law the term of the service of the First Michigan Cavalry covered the months of June and July, 1865, as completely as it did the corresponding months of the year before. It is equally certain that the point at which, and the military force against which, it might be called upon to serve during the war were matters exclusively for the political and military authorities of the country to pass upon. So long as in the judgment of the political department the objects of the war had not been attained and secured, the Army was to remain upon the alert to resist any violence, direct or collateral, principal or incidental, that might arise to jeopardize success. In such a condition of things it seems impossible to allow soldiers to draw distinctions involving the degree or direction of the professional service which they are to render.

I therefore answer the questions above stated respectively as follows:

1. The specified retention of the regiment until March, 1866, was legal.

Twenty per cent. Additional Duty.

2. The order sending the regiment to quell an Indian outbreak in New Mexico in June, 1865, was valid.

3. The offense committed by the men at Fort Leavenworth, taken in connection with the animus by which it was inspired, was in point of law *desertion*.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Solicitor-General.

The SECRETARY OF WAR.

Approved:

CHAS. DEVENS.

TWENTY PER CENT. ADDITIONAL DUTY.

Where certain cubebs, *produced* in a country east of the Cape of Good Hope, but *imported* from Rotterdam, in November, 1879, were entered at a value more than 10 per cent. below their true value: *Held* that the importation was liable to the additional duty of 20 per cent. ad valorem imposed by sec. 2900 Rev. Stat.

DEPARTMENT OF JUSTICE.

May 12, 1880.

SIR: Yours of the 6th instant, addressed to the Attorney-General, presents the case of certain cubebs, *produced* in a country east of the Cape of Good Hope, but *imported* from Rotterdam, in November, 1879 (Rev. Stat., sec. 2501), which were stated in the entry at a value more than 10 per cent. under their true value; and asks whether under these circumstances they are liable to the 20 per cent. duty imposed by section 2900 of the Revisal.

I have in this connection read and considered the papers which accompany your letter and present the respective views of the *importers* and *custom-house officers*.

I see no reason for doubting the legality of the exaction. There seems to be the same reason for requiring the *true value* of the goods imported to be stated *under such circumstances* as under any other in which an ad valorem duty is imposed, and therefore the same reason for exacting the 20 per cent. imposed by section 2900. The words of the Revisal hereupon are plain, and therefore, as is said by the Supreme Court in a late case not yet reported, the structure of the previous legislation therein incorporated (supposing, as is not admitted, that this would suggest a different conclusion) is

Commander of Military Department.

irrelevant, as is also an investigation of the *policy* of the United States in imposing the 10 per cent. duty under consideration (5 Wall., 111).

Very respectfully,

S. F. PHILLIPS,
Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved:

CHAS. DEVENS.

EXTRA TERRITORIAL IMPRISONMENT.

The legislature of Wyoming Territory has no power to direct that persons convicted of violations of the laws thereof shall be imprisoned at any place outside of the boundaries of that Territory.

DEPARTMENT OF JUSTICE,
May 13, 1880.

SIR: In conformity with the direction received from you this morning, I have read the opinion of Judge Peck, of Wyoming, referred to in the letter addressed to the Attorney-General by the Hon. Mr. Downey, Member of Congress, and after consulting the organic act of that Territory and other legislation by Congress upon the subject, concur in the conclusion at which Judge Peck arrived, viz, that the legislative assembly of Wyoming has no power to direct that persons convicted of violations of the laws thereof shall be imprisoned at any place outside of the boundaries of that Territory.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Solicitor-General.

The PRESIDENT.

Approved:

CHAS. DEVENS.

COMMANDER OF MILITARY DEPARTMENT.

In the absence of legislation, or of orders from competent authority, forbidding it, personal presence within the territorial limits of his command is not essential to the validity of an order given by a department commander appointing a court-martial within such limits. He may

Commander of Military Department.

appoint general courts-martial, and act upon the record of proceedings of the same, when outside the territorial limits of his command.

DEPARTMENT OF JUSTICE,

August 28, 1880.

SIR: Yours of the 24th instant, asking whether a department commander assigned by the President to command can exercise the functions of his office to appoint general courts-martial, and act upon the record of proceedings of the same *when he is outside the territorial limits of his command*, has been duly considered, in connection with *Orders No. 26, Washington, May 18, 1878*, in the case of General Kurtz, and *Orders No. 9, Vancouver Barracks, W. T., May 14, 1880*, transmitted by you in the same connection, and herewith I submit a reply.

The division and subdivision of the territory of the United States into military divisions and departments is a matter of discretion for the President, and scarcely anything, and that indirect and for the present purpose unimportant, is to be found upon the subject in the statutes. *Orders* making such geographical division and assigning officers to their command are also very brief, and throw no special light upon the present question.

In the absence of special orders or legislation to that effect, I am of opinion that personal presence within the territorial limits of his department is not essential to the validity of commands given by a department commander to be executed within such limits, such, for instance, as the appointment of a court-martial.

The question which you put is *general* as regards the absence in question, so that my answer is necessarily general also. Whether there may be exceptions to it growing out of special circumstances attending *absence* can be best determined when those circumstances arise. But I see no reason why mere absence should have the effect of invalidating such commands.

The distribution of military command into geographical departments is, as I suppose, mainly for the purpose of preventing collision and confusion, and so of securing individual responsibility in the *execution* commanded by officers otherwise of like authority. Practically, such collision is to be

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apprehended rather in *execution* than in *exercise*. It seems, therefore, that the place of the action taken is material to the question of the proper *execution* of command, rather than to that of its proper *exercise*. In the analogous cases of civil authority the incident of geographical limits for its execution has not, in the absence of special features, been considered to require, *ex. gr.*, judicial orders to be issued by a judge only whilst within such limits. In order to render this necessary, something *else* must concur to indicate the will of the constituting authority. The ground of this opinion is that there is at present here nothing *else* to indicate the will of the President or other proper superior authority that the functions of commanding officers should be so limited. In the mean time the arguments in its favor are such as are for consideration only by the power having legislative or quasi legislative control of the question (*i. e.*, by statute or by order).

Very respectfully, your obedient servant,

S. F. PHILLIPS,

Solicitor-General.

The SECRETARY OF WAR. .

Approved :

CHAS. DEVENS.

CASE OF THE PROPELLER KENT.

By act of May 2, 1878, chap. 80, an American register or enrollment was authorized to be issued to the Canadian-built propeller East by the name of the Kent. The vessel was dismantled as a *steamer*, and subsequently enrolled under that act as a *barge*. Afterwards the machinery was replaced in her; but the inspectors of steamboats declined to give her a certificate of inspection—the boiler not being constructed of *stamped* iron, as required by section 4428 Rev. Stat. *Held* that the act of 1878 was executed by the enrollment of the vessel as a *barge*; and that the boiler, being then no part of the vessel, was not nationalized under that act, nor entitled to pass inspection without being stamped.

DEPARTMENT OF JUSTICE,

December 22, 1880.

SIR: Your communications of the 3d and 17th instants present for an opinion by the Attorney-General the following case and question:

“The steam tug-boat East was of Canadian construction,

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and was built since 1852. By act of Congress of May 2, 1878, volume 20, page 47, the Secretary of the Treasury was authorized and directed to issue an American register or enrollment to the said Canadian-built propeller East by the name of Kent, to which the name of said vessel was thereby changed.

"The act of 1852, volume 10, page 69, section 13, requires that 'every boiler manufactured to be used on steam-vessels, and made of iron or steel plates, shall be constructed of plates that have been stamped in accordance with the provisions of this act.' This provision was re-enacted in 1871, and incorporated in the Revised Statutes in section 4428. The boilers in the Kent are constructed of iron plates not stamped, and the inspectors of steamboats, whose duties as to inspection are set forth in sections 4418 and 4421, refuse to give her a certificate of inspection for the reason that the boilers are not constructed of stamped iron or inspected iron plates.

"It appears that this vessel was dismantled as a steamer about the time of the approval of the act of May, 1878, and was enrolled under its authority at Ogdensburg, N. Y., October 10, 1878, as a barge. This enrollment was surrendered March 15, 1880, and another, as a barge, was issued to her. This latter has not been surrendered.

"The question submitted for your opinion is whether the Kent is entitled to a certificate of approval from the inspectors; the owners contending that the act authorizing the issue of an American register or enrollment grants the right to use the steamer with such boiler as was in her at the date of said act."

But for the variation in the circumstances of this case made by yours of the 17th, viz, that when the owners of the *Kent* availed themselves of the privilege of enrollment granted by the act of 1878 she had been *dismantled*, and was no longer a "*propeller*," it seems plain that her boiler would have been entitled to inspection without being *stamped*, for the act in question dispensed with all prerequisites to registry or enrollment, and therefore amongst these with the stamping of the boiler-plates.

But when the owners chose to avail themselves of their privilege in the form in which they did, and virtually presented to the enrolling officers as the identical Kent mentioned in the

Case of the Propeller Kent.

act of 1878 a vessel in some respects dismantled, it seems that act thereby was *executed*, as it were, and that they were not entitled at the the end of a year or more to come again with the Kent, in a new form, and require the United States inspectors to verify their suggestion that this also was in all legal respects the identical Kent mentioned in the act of 1878, and that her unstamped boiler-plates were the plates of that Kent.

The act of 1878 did not execute itself as regards nationalization, but required for that effect an enrollment of the "propeller." Although a propeller in May, I see no reason to doubt that, under the act, the Kent might well have been dismantled and enrolled as a barge. In that event, all the machinery, &c., omitted at enrollment failed to be nationalized. I apprehend that this machinery, &c., could not be nationalized except at the nationalization of the Kent, *and as part thereof*. For instance, it could not have been competent to place *the boiler* in some other American vessel; I mean, at all events, before it had been nationalized as part of the Kent. It, therefore, seems that, after the enrollment of October, 1878, the act of May previous was to be considered as *functus officio*, and therefore that other parts of the original vessel could not thereafter be produced, whether separately or after being reattached for supplementary nationalization, or therefore as entitled to pass inspection without (say) being *stamped*.

This argument seems technical, but it occurs that arguments *ab inconvenienti*, drawn from the impolicy of leaving for several years so much to evidence *in pais* as to identity of parts, &c., might be readily adduced to the same effect.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Solicitor-General.

THE SECRETARY OF THE TREASURY.

Approved:

CHAS. DEVENS.

INDEX.

ABEYANCE OF OFFICE.

See APPOINTMENT, 5.

ACCOUNTS AND ACCOUNTING OFFICERS.

1. The provision in section 3622 Rev. Stat., giving the Secretary of the Treasury power, when in his opinion the circumstances of the case justify and require it, to extend the time prescribed for the rendition of accounts, does not authorize him to institute a new system of rendering accounts—*e. g.*, by permitting disbursing officers to render their accounts bimonthly, quarterly, or at longer intervals, instead of monthly as now required. 222.
 2. That provision is intended only to enable the Secretary of the Treasury to deal with particular cases, wherein accidental circumstances make it proper to give more time for the rendition of the accounts by way of exception to the general rule. *Ibid.*
 3. The regulations of the Navy concerning payments to administrators of balances due deceased seamen and marines, payments of arrearages claimed under wills, the wills of persons in actual service and the attestation of the same, &c., are not applicable to or binding upon the accounting officers of the Treasury Department in the settlement of naval accounts. They extend to and govern only those persons who are in the naval service. 494.
- See CLAIMS, 1, 2, 4, 6; CONSUL, 2; POSTAL LAWS, 9; STATE WAR CLAIMS, 3, 4; TRANSPORTATION, ARMY, 3, 5.

ACCUSER OR PROSECUTOR.

See COURT-MARTIAL, 5, 6.

AD INTERIM APPOINTMENT.

See APPOINTMENT, 10.

ADJUSTMENT OF RAILROAD LAND-GRANT.

See LANDS, PUBLIC, 17.

ADVERTISEMENTS.

The provisions of section 3828 Rev. Stat., forbidding the publication of advertisements "for any Executive Department of the Government, or for any bureau thereof, or for any office therewith connected," except "under written authority from the head of such Department," extend to offices connected as aforesaid, no matter where located. 616.

ADVERTISING PUBLICATIONS.

See POSTAL LAWS, 12.

ALASKA.

See TERRITORIES, 4.

APPEAL.

1. Where a statute imposes a particular duty upon an executive officer, and he has acted (performed the duty according to his understanding of the statute), there is no appeal from his action to the President or to any other executive officer, unless such appeal is provided for by law. 317.
2. Upon examination of the record in the case of the steamer *Nuestra Señora de Regla*: *Advised* that such a state of facts is presented as renders it proper that there should be an appeal to the Supreme Court of the United States. 339.

APPOINTMENT.

1. Section 2549 Rev. Stat. provides for two appraisers at the port of Baltimore; but, under section 2950 Rev. Stat., an appraisal may be made by any one of them. *Held* that, in case of vacancy in the office of one of the appraisers of that port, there is no duty devolving upon the President to provide an incumbent for it, if, in his opinion, it is unnecessary to do so. 266.
2. Section 1768 Rev. Stat. recognizes the existence of a discretion in the President to not fill an office which has become vacant, where, in his judgment, it is unnecessary in order to execute the laws. The office is not thereby abolished, but is merely left unfilled. *Ibid.*
3. The construction of the provision in the Constitution (Art. 2, sec. 2) investing the President with "power to fill up all vacancies that may happen during the recess of the Senate," &c., by which this provision is construed to comprehend all vacancies that may *happen to exist* in a recess of the Senate, and according to which the President has authority thereunder to fill during a recess of the Senate not only vacancies that have originated in the recess, but also such as originated whilst the Senate was in session, re-affirmed, upon full review of the opinions of former Attorneys-General on the same subject, all of which are shown to concur in that construction. And *seem* that the same construction has, in practice, been uniformly adopted by the Executive, at least since the time of President Monroe. 522.
4. In the provision in section 3 of the tenure-of-office act of March 2, 1867, chap. 154 (which, with the amendment made by section 3 of the act of April 5, 1869, chap. 10, is reproduced in section 1769 Rev. Stat.), authorizing the President "to fill all vacancies which may happen during the recess of the Senate by reason of death, &c., by granting commissions which shall expire at the end of their next session thereafter," Congress must be presumed to have employed the words of the Constitution used therein, viz, "which

APPOINTMENT—Continued.

may happen during the recess of the Senate," in the same sense in which they have been accepted and acted upon by the Executive branch of the Government. (Reaffirming opinion of Attorney-General Evarts, in 12 Opin., 449.) *Ibid.*

5. The further provision in the same section (also in section 1769 Rev. Stat.) putting "in abeyance" an office "so vacant," &c., if no appointment thereto with the consent of the Senate is made "during such next session of the Senate," does not assume to act upon the power of appointment given to the President by the Constitution. It acts upon the office itself, but does not thus act until the expiration of the *next* session of the Senate. Hence, in the case of a vacancy which has originated during a session of the Senate, the office cannot be affected by that provision until the end of the succeeding session of the Senate; and during the intervening recess of the Senate the President may fill the vacancy by a temporary appointment. 523.
6. Accordingly, where the office of collector of customs for the port of Philadelphia became vacant while the Senate was in session, by expiration of the term of the incumbent, and the President thereupon, during the same session of that body, sent to the Senate for confirmation the nomination of H. for the office; but the Senate having subsequently adjourned without acting upon the nomination, the President, during the recess thereof immediately following, appointed H. to fill the vacancy in said office by granting him a commission to expire at the end of the next ensuing session of the Senate: *Held* that it was competent to the President thus to fill the vacancy by a temporary appointment. *Ibid.*
7. By the act of June 11, 1878, chap. 180, authorizing the appointment of two Commissioners of the District of Columbia, and fixing their official term at "three years, and until their successors are appointed and qualified," it is provided that "the first appointment shall be one Commissioner for one year and one for two years, and at the expiration of their respective terms their successors shall be appointed for three years." A Commissioner who had received one of the first appointments under the act, being that made for two years, resigned, whereby the office became vacant before the expiration of the two years for which he was appointed. *Held* that the commission of his successors should be for the term of three years; the words of the statute, "and at the expiration of *their respective terms* their successors shall be appointed for three years," being construed to mean that when the term of the incumbent comes to an end, whether by its own limitation, or by death, resignation, or otherwise, the President is then and thereafter to appoint for the full term of three years. 537.
8. Where the office of district attorney became vacant during a session of the Senate, and was provisionally filled by an appointment made by the circuit justice under section 793, Rev. Stat.:

APPOINTMENT—Continued.

Held that it was competent to the President during the next following recess of the Senate, while the office was still provisionally filled as aforesaid, to make a temporary appointment thereto, to expire at the end of the next session of the Senate thereafter. 538.

9. The appointment of the circuit justice, authorized by said section, contemplates only a temporary mode of having the duties of the office performed until the President acts. The office is not the less *vacant*, notwithstanding the appointment of the circuit justice, so far as the President's power of appointment is concerned. 539.
10. Under sections 177, 178, 179, and 180 Rev. Stat., the President has power to temporarily fill (by an appointment *ad interim*, as there prescribed) a vacancy occasioned by the death or resignation of the head of a Department, or of the chief of a bureau therein, for a period of ten days only. When the vacancy is thus temporarily filled once for that period, the power conferred by the statute is exhausted. It is not competent to the President to appoint either the same or another officer to thereafter perform the duties of the vacant office for an additional period of ten days. 596.
11. On April 30, 1877, during a recess of the Senate, E. was appointed by the President to the office of Chief of the Bureau of Construction and Repair in the Navy Department to fill a vacancy, his commission to expire at the end of the next session of the Senate. At the next session (extra) of the Senate, in October, 1877, he was nominated by the President to that body for said office, under section 421 Rev. Stat., for the term of four years. The nomination was not acted upon during such session, which ended December 3, 1877, and the office became again vacant. At the session of the Senate which immediately ensued, E. was again nominated by the President to date "from April 28, 1877," and the nomination was confirmed in the same terms on April 15, 1878. *Held* that, notwithstanding the special wording of the nomination to, and confirmation by, the Senate, the term of office of the appointee, E., as prescribed by section 421 Rev. Stat., must be deemed to begin from the date of his appointment (namely, in April, 1878), and not "from April 28, 1877," the date specified in the nomination. 656.

APPRAISERS.

See APPOINTMENT, 1.

APPROPRIATIONS.

1. The appropriation of \$75,666.50 to pay for horses, steamboats, and other property lost in the military service, made by the act of June 14, 1878, chap. 191, was not intended to apply to the steamboat B. P. Cheney. The provision in the act of June 20, 1878, chap. 359, declaring that said appropriation should not be construed to authorize the payment of the claim for that steamboat

APPROPRIATIONS—Continued.

without further legislation, is explanatory of the former enactment. 213.

2. The amount of the appropriation is subject to the requisition of the Secretary of War, to be applied to those objects which the appropriation describes, with that exception. *Ibid.*
3. Section 2 of the act of June 19, 1878, chap. 328, providing that \$20,000 be placed to the credit of the contingent fund of the Senate, is to be construed as if the words "said investigations and inquiries as have already been," &c., read "*such* investigations and inquiries as have already been," &c. 235.

See CLAIMS, 1, 3; LOUISVILLE AND PORTLAND CANAL, 1.

ARMY.

1. A certificate of merit cannot be issued under section 1216 Rev. Stat. to a soldier who applies for the same after his discharge. It is contemplated by that section that the applicant shall continue to be, at the time of the issuance of the certificate, a soldier of the United States. 9.
2. The officers who were placed upon the retired list of the Army under the authority given by the acts of May 10, 1872, chap. 153, March 3, 1875, chap. 187, and June 26, 1876, chap. 144, are to be enumerated as a part of the three hundred to which, by section 1258 Rev. Stat., the number upon the retired list is limited. 26.
3. The Regulations of the Army have the force and effect of law so far as they are consistent with the statutes. Those at present in force (regulations of 1863) have been adopted by the act of July 28, 1866, chap. 299, which provided (sec. 37) that the then existing regulations should remain in force until further action by Congress. 38.
4. Opinion of June 6, 1878, in the case of Dr. Archibald B. Campbell, assistant surgeon, referred to, and *held*, further, in same case: (1) That C., who entered the service as assistant surgeon with the rank of captain October 14, 1867, ranks W., who was appointed assistant surgeon and first lieutenant May 14, 1867, and captain May 31, 1870. (2) That under the act of July 28, 1866, chap. 299, an assistant surgeon with the rank of captain takes precedence of every assistant surgeon with rank of captain of later date, and of every assistant surgeon with the rank of first lieutenant, "without reference to the date of their entry into service as assistant surgeons. 56.
5. The provision of section 8 of the act of June 18, 1878, chap. 263, giving to Army officers the privilege of purchasing fuel at the rate of \$3 per cord for standard oak wood, do not extend to retired officers of the Army. 92.
6. The words in that section, "or at an equivalent rate for other kinds of fuel, according to the regulations now in existence," are to be understood as only authorizing a sale of the quantity of other fuel for \$3 (viz, 1,500 pounds of anthracite coal or 30 bushels

ARMY—Continued.

- of bituminous coal), which, by the regulations, is made the equivalent of a cord of standard oak wood. *Ibid.*
7. Under section 27 of the act of September 24, 1789, chap. 20, United States marshals derived an implied authority to summon the military forces of the United States as a *posse comitatus* to aid them in the execution of process, the exercise of which authority was sanctioned by long practice. But no express authority thus to summon the military forces is given by any law; and section 15 of the act of June 18, 1878, chap. 263, prohibits the employment of any part of the Army as a *posse comitatus*, except where such employment is "expressly authorized by the Constitution or by act of Congress." 162.
 8. *Held*, accordingly, in a case where an organized, armed, and fortified resistance to the execution of the law existed, that the marshal cannot be aided by the military forces of the United States as a *posse comitatus*. *Ibid.*
 9. The military forces may, however, be used in such case by direction of the President, under the provisions of sections 5298 and 5300 Rev. Stat., should he deem proper to take certain preliminary steps therein provided and if resistance to the law shall thereafter continue. *Ibid.*
 10. G., while holding a commission as second lieutenant of infantry, dated March 7, 1867, and being on the list of unassigned officers created under the provisions of the act of March 3, 1869, chap. 124 (which affected infantry regiments and the officers thereof only), received and accepted a commission as second lieutenant in the Fifth Cavalry, to rank from July 14, 1869, the date of his transfer to that regiment, and has since been promoted in ordinary course to a first lieutenantcy therein. Before accepting his first commission in the cavalry, he remonstrated against the refusal of the War Department to rank him according to the date of his commission in the infantry. *Held* that, on being transferred to the cavalry, G. was not entitled to take rank from the date of his commission in the infantry, but from the date of his transfer, and that the action of the War Department in giving his new commission the latter date was correct; *held*, further, that his commission as an infantry officer was necessarily vacated by his acceptance of a commission in the cavalry. 290.
 11. Section 1222 Rev. Stat. does not forbid the detail by the Secretary of War of an officer of the Army on the active list for duty on the Geological Survey, under the Interior Department. 490.
 12. But such detail would come within the prohibition of section 1224 Rev. Stat. should it require the officer to be separated from his company, regiment, or corps, or should it otherwise interfere with the performance of his military duties proper. *Ibid.*
 13. *Advised* that the construction of the law as given by Judge-Advocate-General Holt, and since acquiesced in and followed in several instances by the War Department, be adhered to, namely:

ARMY—Continued.

That the rank conferred by section 1096 Rev. Stat. upon the aids selected by the General of the Army thereunder entitles such aids to the precedence, when serving upon courts-martial, courts of inquiry, military boards, and the like, to which the same rank would entitle an officer of the line or staff (independent of the office of aid) when thus serving. 551.

14. The members of the Mississippi River Commission (created by the act of June 28, 1879, chap. 43), who are appointed from the Engineer Corps of the Army, are entitled to mileage, at the rate of 8 cents per mile, for all travel required of them by that commission pertinent to the objects for which it was constituted. Travel so required is travel under orders, within the meaning of section 2 of the act of July 24, 1876, chap. 226. 559.
15. Such mileage should be paid out of the appropriation made in said act of June 28, 1879, for "necessary expenses." *Ibid.*
16. S., an officer in the Quartermaster's Department, standing number four in the grade of lieutenant-colonel, claims that he was over-slaughed by the promotion, in 1866, of the three officers who stand above him in the same grade, under an erroneous execution of the act of July 28, 1866, chap. 299 (whereby certain original vacancies in the grades of major, lieutenant-colonel, and colonel, created by that act, were filled by *selection*, instead of by promotion according to seniority), and he asks that the error be now rectified by the President by appointing him to fill the next vacancy occurring in the grade of colonel in the same corps, over the three officers referred to. *Advised* that (upon considerations stated in the opinion) the President should treat the commissions issued to these officers by his predecessor as conclusive of their right to the rank conferred thereby; that, while those commissions stand, he should have regard to them in making promotions by seniority in said corps; and that, if S. has sustained a wrong in this matter, Congress alone can remedy it. 583.
17. H., a major of infantry, was dismissed from the Army, without trial by court-martial, in July, 1863, by order of the President. In April, 1878, he made application for trial by court-martial under the provisions of section 1230 Rev. Stat. *Held* that the phrase, in that section, "any officer dismissed," is prospective only in its meaning, and that H. is not entitled to a court-martial. 599.
18. On the 9th of October, 1867, C. was appointed to fill an original vacancy in the grade of assistant surgeon in the Army, under the provisions of section 17 of the act of July 28, 1866, chap. 299. He accepted the appointment October 14, 1867. Having previously served as a medical officer of volunteers for more than three years, his appointment entitled him under the same provisions to the rank of captain, and he was accordingly noted as of that rank on the Army Register. *Held* that the relative rank of C. with other assistant surgeons in the medical corps must be de-

ARMY—Continued.

- terminated by reference to the *rank* conferred by his appointment (which is that of *captain*) and the date thereof, and not by reference to the date of his appointment as *assistant surgeon*, irrespective of the rank conferred thereby. 605.
19. Cadets at the Military Academy at West Point are not "enlisted men" within the meaning of section 7 of the act of June 18, 1878, chap. 263. 611.
 20. The phrase in that section, "during the war of the rebellion," is a limitation upon the provisions thereof only with respect to officers of the Army who have served as *officers* in the volunteer forces. It does not apply to those officers of the Army who have served as *enlisted men* in either the volunteer or regular forces. Hence, in computing the service of officers of the latter description for longevity pay and retirement, service performed by them as enlisted men previously to the war of the rebellion must be taken into account. *Ibid.*
 21. C. and T., each of whom had previously served as a medical officer in the volunteer forces during the late war, were appointed to fill original vacancies in the grade of assistant surgeon in the Army, created by section 17 of the act of July 28, 1866, chap. 299, the appointment of the latter having been made in May, 1867, and that of the former in October, 1867. *Held* that neither C. nor T. is entitled (in the absence of a statutory provision authorizing it) to have his commission dated as of the date of the act creating the vacancies, viz, July 28, 1866. 614.
 22. The act of March 3, 1879, chap. 201, authorized the President "to reinstate Maj. Joseph B. Collins, late of the United States Army, and to retire him in that grade, as of the date he was previously mustered out; charging him with all extra pay and allowances paid him at that time." *Held*, 1st, that under that enactment the proper mode of reinstating Major Collins is by an appointment after nomination to and confirmation by the Senate (but see, *contra*, the NOTE on page 626, *infra*); 2d, that upon reinstatement he becomes entitled to pay, by virtue of the same enactment, from the date when he was previously mustered out. 624.
 23. The number and rank of the officers authorized by law to be permanently maintained in the Inspector-General's Department, in the Army, are fixed by the acts of June 23, 1874, chap. 458, and December 12, 1878, chap. 2, as follows: One brigadier-general, two lieutenant-colonels, and two majors. 638.
 24. The subject of *rank*, as between those holding the office of assistant surgeon in the Army, and what effect, in determining such rank, is to be given to the former service of assistant surgeons who, previously to their appointment, had served three or more years in the volunteer medical department (all of which is discussed in opinions of June 6 and July 2, 1878; see pp. 56, 605,

ARMY—Continued.

supra), reviewed, and the doctrine of those opinions reaffirmed. 651.

25. In applying section 1219 Rev. Stat. to the case of assistant surgeons who are entitled to rank as captains, it is not necessary to issue commissions to such assistant surgeons as captains. The office, to which they are already commissioned, is that of assistant surgeon; and promotion therein (from the rank of first lieutenant to that of captain), consequent upon duration of service, results by mere operation of law, and does not require any action by the appointing power to effect it. 652.
26. The men composing a certain volunteer regiment had, in December, 1863, been enlisted "for three years or during the war." In June, 1865, the regiment was ordered to New Mexico to quell an Indian outbreak, and while *en route*, during that and the following month, about two hundred of the men deserted, and did not return. In connection with these facts the following questions have arisen: 1, whether the retention of the regiment in service until March, 1866, was legal; 2, whether or not, under the terms of their enlistment, the men could be ordered to quell the outbreak mentioned; 3, whether or not the men who deserted committed, in point of law, the offense of desertion. Upon consideration: *Held* (1) that the term of service of the said regiment covered the months of June and July, 1865, and its retention in service until March, 1866, was legal, the war not having ended until August 20, 1866; (2) that the point at which, and the forces against which, the regiment might be called upon to serve during the war were matters exclusively for the political and military authorities of the Government to pass upon, and hence the order sending the regiment to New Mexico to quell the Indian outbreak was legal; (3) that the men who deserted as aforesaid thereby committed in point of law the offense of desertion. 675.

See QUARTERS, COMMUTATION FOR.

ARMY REGULATIONS.

See ARMY, 3; STOPPAGE OF PAY, 2, 3.

ARREST UNDER STATE PROCESS.

See INDIAN AGENT.

ASSIGNMENT.

1. S., having a contract with the Engineer Department to perform certain dredging, entered into an agreement with G., by which it was stipulated that S. should furnish two-thirds and G. one-third of the money, material, or labor necessary for the execution of the contract; that in case of loss by reason of such execution the loss should be borne in the proportion of two-thirds thereof by S. and one-third by G., and that the net proceeds should be divided between them in the same proportion. *Held* that such agreement is an assignment of an interest in the contract, and

ASSIGNMENT—Continued.

falls within the provision of section 3737 Rev. Stat., declaring that "no contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party," &c. 277.

2. That provision is intended only for the protection of the United States. The Government may avail itself of the assignment or transfer to annul the contract, but is not compelled so to do. (Reaffirming opinion, on this subject, of April 27, 1877—see 15 Opin., 245-6.) 278.

See CLAIMS, 6, 17; PENSION, 6, 7, 8.

ATLANTIC AND PACIFIC RAILROAD COMPANY.

See LANDS, PUBLIC, 29.

ATTORNEY.

See CLAIM AGENT; CLAIMS, 21.

ATTORNEY-GENERAL.

In order that the Attorney-General may advise the Treasury Department, as contemplated in the act of March 3, 1875, chap. 136, all the facts upon which the question turns should be stated and presented for his consideration. 94.

See COMPENSATION, 4.

BANKS AND BANKING.

1. The provision in section 4 of the act of June 30, 1874, chap. 343, viz, "That the amount of the bonds on deposit for circulation shall not be reduced below \$50,000," is for all purposes connected therewith repugnant to the previous statutory provision (secs. 5159 and 5160 Rev. Stat.) requiring national banks to have and maintain with the Treasurer of the United States a bond deposit to the amount of one-third of their capital stock, and so far in effect does away with such provision. 663.
2. Purpose of said act of June 30, 1874, explained. *Ibid.*
See INTERNAL REVENUE, 6, 7, 8.

BOND OF CORPORATION ENGAGED IN DISTILLING.

See INTERNAL REVENUE, 1.

BONDS OF THE UNITED STATES.

Bonds of the United States bearing date July 1, 1877, which was Sunday, are valid. 125.

BOUNTY.

Bounty can lawfully be paid, under act of July 11, 1862, chap. 144, to one who claims as father of a colored soldier without other proof of heirship than that the claimant and the soldier's mother lived together as man and wife; assuming that the claimant, mother, and soldier were all slaves at the time of the soldier's enlistment, that there is no sufficient rebutting evidence in the case,

BOUNTY—Continued.

and that the living together was at the proper time. In default of father and mother, the bounty can be paid, under like circumstances, to one claiming as brother or sister, who was not born of the soldier's mother. 630.

BRIDGE.

See FORT SNELLING, ETC., 1; FOX AND WISCONSIN RIVERS IMPROVEMENT; TERRITORIES, 1, 2, 3.

CADET.

See ARMY, 19.

CADET-MIDSHIPMEN.

See NAVAL ACADEMY.

CALIFORNIA, SCHOOL LANDS IN.

See LANDS, PUBLIC, 1, 2, 3.

CAMP WRIGHT, CALIFORNIA.

See LANDS, PUBLIC, 8.

CERTIFICATE OF MERIT.

See ARMY, 1.

CESSION OF JURISDICTION.

The provisions of section 4661 Rev. Stat., viz, that "no light-house, beacon, public piers, or land-mark shall be built or erected on any site until cession of jurisdiction over the same has been made to the United States," do not apply to a movable beacon or bug-light, which is not designed to be permanently fixed in any one place, but whose location is contemplated to be changed on the beach from time to time according to circumstances, these changes extending over a distance of half a mile. Those provisions are only intended to include structures whose location is of a fixed and permanent character. 328.

CHEROKEE INDIANS.

See PRESIDENT, 2, 3; INDIANS AND INDIAN LANDS, 5, 7, 8; LANDS, PUBLIC, 18.

CIGARS AND TOBACCO, SALE OF, AT RETAIL.

See INTERNAL REVENUE, 4.

CLAIM AGENT.

The head of a Department has authority to disbar (i. e., decline to recognize or to transact business with) attorneys practicing therein for misconduct. Opinion of Attorney-General Hoar on same subject, in 13 Opin., 150, approved. 488.

CLAIMS.

1. The clause in the sundry civil act of June 20, 1878, chap. 359, namely, "To pay Charles P. Birkett the sum of \$32,505.71, to reimburse the said Birkett, late United States Indian agent, for money expended by him for the benefit of the Indians at Ponca Agency, Dakota," does not amount to a determination by Congress that such sum is actually due to Birkett. It contemplates that there will be an examination by the proper officers of the amount so expended. 66.
2. Accordingly it is the duty of the auditing officers to ascertain whether the amounts expended by Mr. Birkett for the benefit of said Indians equal the sum appropriated, and, if not, to allow him out of the appropriation only that which is found to be due him upon settlement of his accounts for such expenditures. *Ibid.*
3. The terms "interest and costs in judgment cases," as employed in section 3, of the act of June 14, 1878, chap. 191, making an appropriation for the payment of certain claims originating prior to July 1, 1875, comprehend cases of suits discontinued agreeably to instructions of the Secretary of the Treasury, coming within the decisions of the Supreme Court, where the plaintiffs would have been entitled to judgments with interest and costs. In such cases interest and costs are authorized to be paid from said appropriation. 97.
4. In August, 1864, a commissary of subsistence received from P., at Barancas, Florida, sixteen head of beef cattle for the use of the Army, and gave him a receipt therefor, which concluded as follows: "The owner of said stores will be entitled to be paid for the same after the suppression of the rebellion, upon proof that he has from this date conducted himself as a loyal citizen of the United States, and has not given aid or comfort to the rebels." *Held* that the accounting officers of the Treasury have no authority to audit and settle a claim for said cattle. 110.
5. Claims of this character are cognizable only by the Southern Claims Commission, created under the act of March 3, 1871, chap. 116. *Ibid.*
6. An approved account or voucher for transportation performed for the Navy Department by F. & C., contractors, was issued by the chief of the Bureau of Steam Engineering in favor of and delivered to H. & Son, who were brokers for F. & C. The latter claim that the amount appropriated by the act of June 14, 1878, chap. 191, to pay for the transportation, should be paid to them, and not to H. & Son. *Held* that the account or voucher issued as aforesaid is not a negotiable paper; that a transfer or assignment thereof would be void under section 3477 Rev. Stat.; that the appropriation was made for the purpose of paying F. & C., and not any alleged claim of H. & Son; and that the Navy Department may treat such approved account or voucher as a nullity, and reissue an approved account in favor of F. & C. and transmit it to them directly. 191.

CLAIMS—Continued.

7. A claim was presented to the Southern Claims Commissioners, under the act of March 3, 1871, chap. 116, the claimant describing himself in his application as "Alexander Anderson, of Augusta County, Virginia." The commissioners made favorable report thereon, finding the amount due claimant to be \$175. Their report was adopted by Congress, and by act of March 3, 1873, chap. 339, the Secretary of the Treasury was authorized to pay \$175, "out of any moneys in the Treasury not otherwise appropriated," to "Alexander Anderson, of Virginia." In the mean time a claim had also been presented to the commissioners in the name of Alexander Anderson, of Amelia County, Virginia, which was not allowed. The latter claimant, in March, 1873, gave F. a power of attorney to receive for him the \$175 allowed by said act to "Alexander Anderson, of Virginia," describing himself as "Alexander Anderson, of Amelia Court-House, of the county of Amelia, in the State of Virginia." The money was paid to F. on filing said power, who had acted in good faith, and was not informed of the mistake until after he turned over the money to his principal. *Held*, (1) that F. is under no legal liability for the money; (2) that his principal is liable, either at the suit of the rightful claimant or of the United States; (3) that the officer of the Treasury through whose negligence the mistake was made is legally chargeable with the amount, to be passed to his credit on the recovery of the money; (4) the rightful claimant does not, in consequence of the mistake, lose his right to be paid out of any money remaining in the Treasury not otherwise appropriated; (5) a second appropriation warrant may legally issue to again place the amount due the rightful claimant to the credit of the Secretary of War, that he may draw a new requisition on which a new warrant can issue in payment of the claim. 193.
8. The Secretary of the Treasury, by the acts of March 3, 1823, chap. 35, and June 26, 1834, chap. 87, was invested with authority to revise the decisions of the judges when made *in favor* of claimants under the ninth article of the treaty with Spain of February 22, 1819, and from his action thereon the law provided no appeal. The President cannot interpose to change the result of the action of the Secretary. (See *infra*, par. 19, 20.) 200.
9. Upon examination of the papers in the claim of William P. Wood, formerly chief of the Secret Service Division of the Treasury Department, for services in capturing certain counterfeit plates for printing 7.30 Treasury notes, &c., under an alleged agreement with the Secretary of the Treasury in 1867: *Advised*, that the approval of the report of Assistant Secretary French, made by the Secretary of the Treasury September 23, 1878, stand as the final determination of the case. 216.
10. In 1871 the Secretary of War, under authority derived from section 7 of the act of March 3, 1871, chap. 116, entered into a contract

CLAIMS—Continued.

with P. for the construction of a telegraph line from Yankton to Fort Sully, in Dakota Territory, upon the completion whereof, to the satisfaction of the Secretary of War, he was to be paid at the rate of \$8,000 per 100 miles. All the money so paid was to be refunded to the United States in the use of the telegraph line, and until so refunded it was to constitute a lien upon the line in favor of the United States. The entire line having been completed to the satisfaction of the Secretary of War, and P. having been paid all that was due him under the contract except \$3,500, the latter, in April, 1878, sold and conveyed the line to S., and for a valuable consideration agreed with S. to abandon and release, and actually did release, to the United States all his unpaid claim on account of constructing said line. Some time previous to this transfer, however, P. had placed his claim for the \$3,500 in the hand of certain attorneys for collection, agreeing to allow them 25 per cent. of the amount collected, and giving them an irrevocable power of attorney to prosecute and settle the claim. And in August, 1878, he filed his petition for the benefit of the bankrupt act, including in his schedule of assets the claim for \$3,500 against the United States. *Held* that the transaction between P. and S. ending in the relinquishment of the claim for \$3,500 (whereby the latter was relieved of an obligation to refund, in telegraphing, a sum of money which, if paid by the United States, would constitute a lien upon his property) was valid; and that such relinquishment operated as a bar to the collection of the claim by P., or his assignees in bankruptcy, or his said attorneys. 227.

11. Provisions of the act of December 15, 1877, chap. 3, relative to the collection and payment of bounty, prize-money, and other claims of colored soldiers and sailors, considered and construed. 236.
12. All papers connected with the payment of such claims, after the bureau referred to in the said provisions is closed, should be turned over to the Second Auditor of the Treasury Department, that officer "having charge of the payment of bounties due to white soldiers." *Ibid.*
13. In regard to the money in the hands of the Secretary of War for the payment of such claims: *Advised* that it be paid to the Treasurer of the United States, with whom it will remain appropriated for the purposes to which it is now devoted, until Congress shall otherwise dispose of it. *Ibid.*
14. As by the provisions of said act the bureau referred to therein is to be closed, all administrative machinery peculiar to that institution will thereupon cease to exist. 237.
15. Those provisions do not *require* that adjusted cases, for the payment of which money is now in the hands of the Secretary of War, shall, after the 1st day of January, 1879, undergo resettlement by the accounting officers of the Treasury; yet if any substantial reason exists for resettling such cases there is nothing in the statute to prevent it. *Ibid.*

CLAIMS—Continued.

16. The provision in the act of December 15, 1877, chap. 3—viz, that "said bureau shall be closed"—is to be understood as allowing a reasonable time therefor after January 1, 1879. The expenses incident to such work may be defrayed from the appropriation in the act of June 20, 1878, chap. 359. 239.
17. S., having a contract with the Engineer Department for dredging in the Occoquan River, by the terms of which the compensation named therein was to be paid to him from time to time, gave to I. a power of attorney (declared in the instrument to be irrevocable) "to demand, receive, and receipt for, to the proper disbursing officer of the United States, all moneys, warrants, drafts, vouchers, and checks that may become due and payable to me (S.) from the United States for work," &c. Subsequently S. notified the engineer officer in charge that he revoked the power of attorney. *Held* that by force of section 3477 Rev. Stat. said power of attorney was without legal effect with respect to the claim of the contractor against the United States for his compensation; that he might at any time revoke it, and when revoked it is not for the officers of the United States to consider whether the revocation was rightful or wrongful; *held*, further, that the instrument does not amount to a transfer of an interest in the contract so as to authorize the annulment thereof under section 3737 Rev. Stat. 261.
18. The provision in said section making void "all powers of attorney, orders, or other authorities for receiving payment" of any claim upon the United States, or any part or share thereof, is not limited to powers of attorney, &c., relating to claims which are to be paid by Treasury warrant, but extends to those which relate to claims otherwise payable. *Ibid.*
19. Opinion of November 8, 1878, namely, that the President cannot interfere to change the action of the Secretary of the Treasury upon the decisions of the judges under the ninth article of the treaty with Spain of February 22, 1819, for the reason that the acts of March 3, 1823, chap. 35, and June 26, 1834, chap. 87, provide an appeal from the judges' decisions to the Secretary of the Treasury and to that officer only, reaffirmed. (See *supra*, par. 8.) 317.
20. Certain questions touching the duties and proceedings of the judges in regard to claims under said treaty, and the powers and action of the Secretary of the Treasury relating to the same claims, &c., considered and answered; and upon view of the whole matter, *held* that those claims have been more than a quarter of a century settled and determined so far as they can be by the Executive Department of the Government. *Ibid.*
21. An officer of the Bureau of Military Justice cannot lawfully act as counsel for claimant in the Court of Claims, in the prosecution of the claim of another Army officer against the United States. 478.
22. Upon consideration of the facts set forth in the opinion: *Held* that

CLAIMS—Continued.

the settlement of the claim of the State of Pennsylvania for reimbursement of funds expended for payment of militia in the service of the United States, authorized by the act of April 12, 1866, chap. 40, was a matter intrusted by that act to the Secretary of War, and that the award which was made by the Secretary in favor of the State on June 16, 1866, must be treated as *res adjudicata* and binding upon his successors. But *held*, further, that if an error appear in the settlement which is merely clerical in its character, or which involves a matter of computation only, the Secretary of War may now reopen the same to the extent of rectifying such error, but no further. 489.

CLAIMS OF THE UNITED STATES.

By act of June 22, 1874, chap. 388, an appropriation was made to reimburse the Soldiers and Sailors' Orphans' Home for certain moneys (the balance of a deposit of moneys theretofore appropriated for the Home by Congress) involved in the bankruptcy of Jay Cooke & Co. An offer having been made to the Secretary of the Treasury to purchase the claim against that firm for the amount due on account of said deposit: *Held* that this claim must now be treated as a claim belonging to the United States, and that the Secretary has no power to sell the same or to do more than receive for the United States whatever may be paid by the debtor, or his assignee, in discharge of the debt. 407.

COASTING TRADE.

See ENROLLMENT AND LICENSE OF VESSELS, 1, 2.

COIN.

See EXCHANGE OF GOLD AND SILVER; SUBSIDIARY SILVER COINS.

COLORED SOLDIERS AND SAILORS.

See BOUNTY; CLAIMS, 11, 12, 13, 14, 15, 16; ; PENSION, 10.

COMMISSIONER OF INTERNAL REVENUE.

1. The Commissioner of Internal Revenue is not authorized by law to take charge of lands acquired by the United States in satisfaction of judgments recovered on the official bonds of collectors of internal revenue, and, with the approval of the Secretary of the Treasury, to dispose of the same by sale or otherwise. 143.
2. Section 3208 Rev. Stat. does not devolve upon the Commissioner of Internal Revenue the charge of real estate forfeited under the internal-revenue laws where the forfeiture is enforced by proceedings *in rem*. 185.
3. But the custody of real estate acquired in satisfaction of a pecuniary forfeiture arising under those laws is by that section devolved upon the Commissioner. 186.

See INTERNAL REVENUE, 9, 10, 17; LANDS ACQUIRED IN SATISFACTION OF JUDGMENTS, 1.

COMMISSIONER OF PATENTS.

See PATENT, 5.

COMMISSIONERS OF THE DISTRICT OF COLUMBIA.

See APPOINTMENT, 7; DISTRICT OF COLUMBIA.

COMMISSION OF PAY INSPECTOR.

See NAYY, 10.

COMMUTATION.

See QUARTERS, COMMUTATION FOR.

COMPENSATION.

1. An officer who has been appointed to and is fully invested with two distinct offices may receive the compensation appropriated for each. Sections 1763, 1764, and 1765 Rev. Stat. do not apply to such a case. 7.
2. Where a naval officer is transferred, under section 1594 Rev. Stat., from the furlough list to the retired pay list, the causes for his retirement determine the rate of pay to which he is entitled under section 1588 Rev. Stat. An officer retired on furlough pay from causes not incident to the service cannot, by the action of the Executive, be transferred to the 75 per centum retired pay list provided for by the last mentioned section. 22.
3. The compensation of a paymaster in the Army runs from the date of the acceptance of his appointment, not from the date of the approval of his bond. 33.
4. In general, the official duty of a district attorney does not require him to attend to suits in State courts, although the United States may be directly interested therein; and where he appears in those courts (except in certain cases—see section 771 Rev. Stat.) his appearance there must be pursuant to the previous direction, or receive the subsequent approval, of the Attorney-General, to entitle him to compensation from the Government for such service. 99.
5. The compensation of a district attorney for such service is in all cases regulated by section 299 Rev. Stat., with only this exception, that where he has appeared by direction of the Secretary or Solicitor of the Treasury in a suit against a revenue officer, his compensation therefor is regulated by section 827 Rev. Stat. *Ibid.*
6. It is contemplated by section 299 that, where no fees are provided by law to which the compensation of a district attorney in respect to any part of his services can be assimilated, a fair and reasonable compensation for such part of his services shall be made. *Ibid.*
7. Compensation allowed a district attorney under section 299 should be included in the semi-annual return required from him by section 833 Rev. Stat. *Ibid.*

COMPENSATION—Continued.

8. Army officers and soldiers, where they are sent away to attend as witnesses for the Government in any of the United States courts, are entitled, under section 850 Rev. Stat., to receive their *necessary expenses* in going, returning, and attendance on the court, which must be stated in items and sworn to. They are not, in such case, entitled to *mileage* or *witness fees*. 113.
9. The necessary expenses incurred by soldiers as witnesses for the Government, allowable under section 850 Rev. Stat., may be paid by marshals upon proper proof thereof. 147.
10. Section 7 of the act of February 22, 1875, chap. 95, in prohibiting "any allowance for mileage or travel not actually and necessarily performed under the provisions of existing law," does not modify the provisions of section 829 Rev. Stat., in so far as they fix the rate, determine the mode of computation, and limit the compensation of marshals for the service of process. It leaves the marshal entitled to the same compensation for travel for the service of any and every writ to which he would be entitled under those provisions in the absence of that prohibition, if travel has been actually and necessarily performed by him in serving the writ. 165.
11. Where a marshal travels with several writs in his hands, to be served at the same place, he actually and necessarily travels to serve each of them, within the meaning of section 7 of said act. *Ibid.*
12. *Held*, accordingly, that a marshal is entitled to full mileage on each writ served by him when several writs issued in behalf of the Government, to be served on different persons, are or might be served at the same time, only one travel being necessary to make the service on all such persons—where the travel is actually performed. Opinion of May 29, 1876 (15 Opin., 108), overruled. *Ibid.*
13. Under section 2, act of May 7, 1878, chap. 96, all compensation due for transportation for the Quartermaster's Department performed over such portions of the Union and Central Pacific Railroads as were built with the aid of Government bonds should be retained. And *advised* that all compensation due to the same roads (they being indebted to the United States upon subsidy bonds) for such transportation performed over those portions of roads owned, leased, controlled, and operated thereby, which were not built with the aid of Government bonds, be also retained, so that the question involved as to such portions of roads can be judicially determined. Same advice, on similar grounds, given in regard to compensation due for transportation performed over the Kansas Pacific, Denver Pacific, and Union Pacific consolidated, and in regard to compensation due for transportation performed over the Sioux City and Pacific and the Central Branch Union Pacific Railroads, and over lines owned, leased, controlled, and operated thereby. 516.

COMPENSATION—Continued.

14. Under section 5260 Rev. Stat., all compensation due for transportation for the Quartermaster's Department performed over the Kansas Pacific Railroad (as well over that portion which was not as over that portion which was built with the aid of Government bonds) should be withheld. *Ibid.*
15. On the 28th of May, 1880, D., being then a deputy surveyor of customs at the port of San Francisco (appointed with the approbation of the Secretary of the Treasury), whose salary, as fixed by law (sections 2721 and 2746 Rev. Stat.), exceeded \$3,000 per annum, was authorized by the collector of that port, under section 2629 Rev. Stat., to perform the duties and exercise the functions of surveyor at the same port (there being a vacancy in this office, caused by the death of the late incumbent), and did perform such duties and exercise such powers until July 23, 1880, when the vacancy was filled by appointment by the President. *Held*, (1) that the office of deputy surveyor held by D. did not become vacant upon his designation to and by his acting as surveyor; (2) that he is not entitled to the compensation provided for the office of surveyor for the period during which he performed the duties and exercised the powers of that office. The allowance to him of any compensation beyond that attached to the office of deputy surveyor is forbidden by section 1763 Rev. Stat. 565.
16. In April, 1863, during a recess of the Senate, B. was temporarily appointed a major and aide-de-camp in the Army. His appointment expired by limitation on July 4, 1864, the end of the next session of the Senate following the appointment; but he was not *officially notified* of that fact until January 7, 1865. Under an order of the Secretary of War authorizing pay until official notification, he drew pay as major, &c., until December 31, 1864. He now applies for pay from January 1 to January 7, 1865, inclusive. *Held*, (1) that B.'s commission expired by operation of law on July 4, 1864, of which he was bound to take notice, and that thereafter he became a private citizen; (2) that the services subsequently rendered by him were merely voluntary, and did not create a legal right to pay; (3) that unless his right to pay has since been recognized by legislation, he is now a debtor to the United States for the money which he subsequently received. 567.

See ARMY, 22.

COMPENSATION FOR CARRYING THE MAIL.

See POSTAL LAWS, 6.

COMPROMISE.

1. Under section 3463 Rev. Stat., the Solicitor of the Treasury may properly recommend the acceptance of a compromise offered in discharge of a claim of the United States before judgment,

COMPROMISE—Continued.

- where the defendant is able to pay the amount of the claim, but where the district attorney advises acceptance upon the ground that, from want of evidence to establish the facts on which a verdict must depend, he doubts his ability to obtain a judgment. This case distinguished from that considered in the opinion of January 8, 1879 (see *infra*.) 259.
2. Although the case may belong to that class of cases for relief in which special provisions are found in the act of June 22, 1874, chap. 391, yet this does not prevent an application for compromise thereof being made under the more general provision in section 3469 Rev. Stat. *Ibid*.
 3. Certain land in Pennsylvania was set off to the United States on execution against a debtor, over which the Government subsequently exercised acts of ownership by leasing and offering the same for sale. One S. claims title to the land through certain persons who, as is alleged, owned it previous to the levy on the execution; and, he being in possession, an action of ejectment has been brought by the Government against him, which is still pending. He proposes to compromise by paying to the Government a certain sum, and the United States to abandon the suit and the title to the property. *Held* that section 3469 Rev. Stat. does not confer authority to entertain the compromise proposed. 384.
 4. That section was intended to provide for compromising claims in favor of the United States which are of a personal character. It does not extend to claims to real property to which the United States asserts ownership and has a record title. 385.
 5. A customs officer having power to seize property claimed as forfeited for violation of the customs laws, who in the performance of his duty actually makes a seizure in order to enforce the claim of the Government to the property seized, is an "agent having charge of" the claim within the meaning of section 3469 Rev. Stat. In such case, upon a report from him recommending that the claim be compromised, the Solicitor of the Treasury would be authorized under that section to make a recommendation to the Secretary of the Treasury concerning the same matter. 570.
 6. Section 3469 Rev. Stat. does not confer upon the Solicitor of the Treasury a discretion to recommend for compromise by the Secretary of the Treasury cases in which the claim is entirely solvent, but where circumstances of hardship, &c., exist. 617.
- See INTERNAL REVENUE, 10; POSTAL LAWS, 13.

CONDEMNATION.

See LAND, ACQUISITION OF, 1.

CONDITION.

See LANDS, PUBLIC, 16, 29.

CONSUL.

1. The action of a consul, in the exercise of the discretion given him by sections 4580, 4581, 4583, and 4584, respecting the discharge of seamen in a foreign port, is not reviewable otherwise than by some competent court. 268.
2. Where a consul has collected extra wages of the master of a vessel in a foreign port, or requested collection of such extra wages on the arrival of the vessel in the United States, it is not competent to the Secretary of the Treasury, or any bureau of the Treasury Department, in the examination of the accounts of the consul, to do anything more than revise the amount of the collection and determine its arithmetical accuracy. *Ibid.*

CONTRACT.

1. In September, 1876, L. contracted to deliver beef cattle at the Pawnee and several other Indian agencies, and by article 5 of the contract "not over one-fourth at each delivery were to be cows." On February 5, 1877, said article was modified as follows: "In the requirements of three-fourths of each delivery to be steers and one-fourth cows, so that the restriction as to the proportion of steers and cows is removed, but for all cows delivered in excess of the one-fourth provided for in the contract a deduction of 6 per cent. shall be made from the net price of \$3.56 per one hundred pounds at the Pawnee, and \$3.73½ at the other agencies." *Held* that under the modification the contractor is permitted to deliver cows in excess of one-fourth of the number of steers delivered, and that upon the cows delivered in excess of the one-fourth he is subjected to a deduction of 6 per cent., but that he is not entitled to full payment for one-fourth of all the cattle delivered where all the cattle delivered are cows. Thus, if he delivered one hundred cattle, of which three were steers and the rest cows, he would be entitled to receive on the three steers and one cow full payment, and on the remaining ninety-six cows he would be subjected to the 6 per cent. deduction. If the one hundred cattle delivered had been all cows, he would be subjected to the 6 per cent. deduction on the whole delivery. 75.
2. A contract was made by the Subsistence Department with H. and B., by the terms of which the latter were to furnish 100,000 pounds of tobacco of a certain quality between August 20 and November 30, 1878, in such quantities as might be required; they further agreeing "that if the Subsistence Department shall require more tobacco during the continuance of this contract and prior to the 30th of November, 1878, than the 100,000 pounds above stated, they will furnish, subject to the same conditions and at the same price, an additional 150,000 pounds, or any less amount, provided that due notice is given them prior to the 30th of November, 1878, aforesaid." *Held* that, as to the additional quantity of 150,000 pounds, an option exists in favor of the Subsistence Department to receive such additional quantity or not;

CONTRACT—Continued.

and that the Department is not, by the provisions in the contract above quoted, precluded from advertising for new proposals, and awarding a new contract for tobacco of a quality superior to that furnished by H. and B. under their contract. 183.

3. Under the provisions of the contract of Messrs. Coyle & Co. with the Commissioners of the District of Columbia, to construct a sewer running from the Potomac River across the White Lot and then along the line of certain streets, &c., in Washington, D. C., the contractors are entitled to the surplus earth (excavated along the line of the sewer) which remains after the sewer is laid and the trench has been filled so as to restore the original level. 372.

See CLAIMS, 10, 17; PROPERTY LOST IN THE MILITARY SERVICE; TRANSPORTATION, ARMY, 3.

CORRESPONDENCE, OFFICIAL.

See OFFICIAL ENVELOPE, 3.

COURT-MARTIAL.

1. A quartermaster's clerk (i. e., a *civilian* employed in that capacity) is not amenable to court-martial jurisdiction. 13.
2. Nor are superintendents of national cemeteries, appointed under sections 4873 and 4874 Rev. Stat., amenable to such jurisdiction. *Ibid.*
3. The statutes of the United States, in so far as they declare what persons or classes of persons are thereby made liable to military law and subjected to the jurisdiction of military courts, reviewed. *Ibid.*
4. Where a quartermaster's civilian clerk was under arrest by the military authorities, at a post in the State of Nebraska, on a charge of conspiring to defraud the Government: *Held* that the accused was not subject to court-martial jurisdiction. 48.
5. Where the record of a trial before a court-martial is defective, in failing to show who was the originator or signer of the charges against the accused, and who is to be treated legally as the accuser or prosecutor, evidence *aliunde* is admissible to supply the information. 106.
6. A commander of division who, upon information laid before him of grave misconduct on the part of a regimental officer in his command, directed the colonel of the regiment (from whom the information was received) to prefer charges against the alleged offender, and who saw that the charges were put in proper form, and to that extent superintended their preparation, cannot be deemed the accuser or prosecutor of such alleged offender in the sense of the act of December 24, 1861, chap. 3 (section 1342 Rev. Stat., article 73). *Ibid.*
7. A soldier was sentenced by a court-martial to be dishonorably discharged from the service and to be imprisoned in the military prison at Fort Leavenworth for two years. While in confinement

COURT-MARTIAL—Continued.

- under this sentence he committed offenses punishable by the Articles of War, for which he was a second time tried by court-martial and sentenced to imprisonment in the same prison for an additional term of three years, which he is now serving out. *Held* that under section 1361 Rev. Stat. valid authority exists for the trial by court-martial of prisoners in the military prisons, who, while serving out the term of their imprisonment, commit offenses punishable by military law, although they have been discharged from the Army by the sentence under which they are imprisoned. 292.
8. Such prisoners are to be regarded as still connected with the military service and subject to military government, for the purposes of discipline and punishment; and the sentence, part of which is dismissal from the service, must be understood to not do away with that relation during their imprisonment. 293.
 9. Where an Army officer was sentenced to dismissal from the service, and the sentence, without having been approved by the President, was carried into effect under orders of the War Department: *Held* that the subsequent recognition by the President of the vacancy thus occasioned by making an appointment during a recess of the Senate, or a nomination to that body (followed by the issuance of a commission with the consent of the Senate) of a person to fill the place of such officer, operates as a confirmation by him of the sentence and orders. 298.
 10. Whether a sentence of court-martial has been confirmed by the President is to be determined by evidence, no specific form for this act having been provided by statute. *Ibid.*
 11. B., a paymaster in the Navy, was tried and convicted by a naval general court-martial, convened on board the U. S. S. Pawnee, at Montevideo, Uruguay, in November, 1868, under an order of Rear-Admiral C. H. Davis, commanding the South Atlantic Squadron, and was sentenced (*inter alia*) to be dismissed from the naval service. The record of the proceedings was received at the Navy Department with the following, signed by Rear-Admiral Davis, indorsed thereon: "Respectfully forwarded, with the remark that the finding of the court is not sustained by the evidence, which fails to show that the accused received from the bank the amount of money he is charged with having received." *Held* that the action of the officer who ordered the court (Rear-Admiral Davis), in forwarding the proceedings with that indorsement thereon, cannot be deemed to be a disapproval of the sentence of the court. Such disapproval should be distinctly expressed. 312.
 12. On the 28th of January, 1869, the Secretary of the Navy addressed a letter to B, as follows: "In consequence of the facts appearing upon the record of the naval general court-martial before which you were tried, November 16, 1868, on board the U. S. S. Pawnee, at Montevideo, Uruguay, you are dismissed the naval service, and will from this date cease to be regarded as an officer in the United

COURT-MARTIAL—Continued.

States Navy." *Held* that this must be regarded as a dismissal by reason of the disclosures in the record (which dismissal the Executive had then no power to make), and not as an approval and execution of the sentence. *Ibid.*

13. C., being then a soldier in the service of the United States, was, on the 24th of March, 1865, sentenced by a court-martial to be hanged for desertion, robbery, and murder. The proceedings of the court were approved by the officer in command of the department, and the sentence ordered to be executed on the 21st of July, 1865. The execution did not take place, for the reason (as is presumed) that the prisoner escaped. In 1870, C. applied to the military authorities for an honorable discharge (the application being based on certain statements afterwards discovered to be false), which was granted, and dated June 5, 1865. This discharge was subsequently revoked, and the certificate canceled by the War Department, on the ground that it was given under a misapprehension of facts caused by the false statement aforesaid. On the 5th of May, 1875, he was dishonorably discharged as of July 21, 1865, the day appointed for his execution. *Held*, (1) that the revocation of the "honorable discharge" and cancellation of the certificate thereof were proper; (2) that the second discharge operated to cut C. off dishonorably from the service, but did not alter his status as a military prisoner awaiting execution of sentence; (3) that no legal obstacle now exists to the execution of the sentence. But (on considerations stated in the opinion) recommended that the sentence be commuted to imprisonment for life, or to such term of years as the President may in his discretion determine. 349.
14. P., a midshipman, was nominated and confirmed in March, 1868, to be ensign, the promotion being made "subject to examination." In July, 1868—having never been examined—he was tried by a naval court-martial as a midshipman, and sentenced to dismissal from the service. *Held* that, under the circumstances, he was properly tried as a midshipman. 550.
15. The minority of some of the members of the court-martial is not available as an objection to the validity of its proceedings. *Ibid.*
16. Notification by the Secretary of the Navy of the approval by the President of the sentence is sufficient evidence both of approval and promulgation. *Ibid.*
17. Where an assault was committed on board a steamer belonging to the Navy (the vessel being at the time under way in the Thames River, opposite the city of New London, Conn.) by a coal-heaver in the naval service upon a second-class fireman in the same service, from the effects of which the latter subsequently died: *Held* that a naval general court-martial can, under article 22 of section 1624 Rev. Stat., take jurisdiction of the offense as manslaughter. 578.

COURT-MARTIAL—Continued.

18. That article is not intended to confer upon a court-martial general criminal jurisdiction, but only jurisdiction over those offenses (not specified in the preceding articles of said section) which are injurious to the order and discipline of the Navy, the jurisdiction being given for the purpose of preserving that order and discipline. *Ibid.*
19. In the absence of legislation, or of orders from competent authority, forbidding it, personal presence within the territorial limits of his command is not essential to the validity of an order given by a department commander appointing a court-martial within such limits. He may appoint general courts-martial, and act upon the record of proceedings of the same, when outside the territorial limits of his command. 678.

CREEK ORPHAN FUND.

1. Article 2 of the treaty with the Creek Indians of March 24, 1832—in providing that twenty sections of the lands therein referred to should be selected under the direction of the President for the orphan children of the Creeks, and divided and retained or sold for their benefit, as the President might direct—intended to make provision for those who were then orphan children of the Creeks, not those who might afterwards become such. 31.
2. The taking of \$176,755.97 by the Indian Bureau from the accrued interest arising from investments of the proceeds of the sale of those lands, known as the Creek orphan fund, and the expending of the same by the bureau for the benefit of the loyal refugees of the Creek tribe during the years 1863 to 1865, was a diversion of the fund not authorized by the said treaty of 1832 nor by subsequent legislation. *Ibid.*
3. The assent of the Creek tribes in the eleventh article of the treaty of June 14, 1866, to the diversion of the annuities which had been made from the funds of the tribe, cannot be interpreted as an assent to the diversion of the Creek orphan fund; nor has this diversion been ratified by the Creeks by any subsequent treaty. *Ibid.*
4. The Department of the Interior has no authority to remedy the diversion of the Creek orphan fund by restoring the moneys. Relief can only be obtained through Congressional action. *Ibid.*
5. The investment in bonds of the State of Virginia, in 1851, of the moneys belonging to the Creek orphan fund arising from the sale of bonds of the State of Alabama, was an error on the part of the President; he being then required, by section 25 of the act of September 11, 1841, chap. 25, to make such investment in stocks of the United States. *Ibid.*
6. That error cannot now be remedied by the Interior Department. It is for Congress to determine whether the loss thereby occasioned is one which should be borne by the United States. *Ibid.*

CUSTOMS LAWS.

1. In executing the act of March 3, 1875, chap. 136, the Secretary of the Treasury is not restricted to an application of a decision of the Supreme Court to such articles only as are *specifically* embraced therein, but may properly extend his official action to all articles within the *principle* of the decision. 20.
2. An importation of goods at Plattsburgh was there appraised by the customs officers, and subsequently entered for transportation in bond to New York. Upon arrival at the latter place, the appraiser re-examined the goods and reported that the dutiable value was greater by 10 per cent. than the value at which they were entered at the port of first arrival. The matter having been submitted to the Treasury Department, the papers were referred to the customs officers at Plattsburgh, who thereupon reported the value stated by the appraiser at New York to be the correct value of the goods at the date of importation. No reappraisal was ordered by the collector at Plattsburgh, nor was any reappraisal made there either with or without notice to the importers. *Held* that the 20 per cent. additional duty mentioned in section 2900 Rev. Stat. cannot be assessed upon the goods, the requisite preliminary steps required by the statute not having been taken. 65.
3. Section 2981 Rev. Stat. does not require customs officers to recognize the lien of inland carriers upon goods transported in bond. 74.
4. The Secretary of the Treasury has no authority, under section 2993 Rev. Stat., to protect such lien by a Treasury regulation. *Ibid.*
5. Section 2900 Rev. Stat. does not apply to an entry made in the absence of a certified invoice, upon affidavit, under the provisions of sections 9 and 10 of the act of June 22, 1874, chap. 391. The terms "original invoice," employed in section 2900, mean the consular invoice only. 158.
6. Where the value in such an entry is falsely stated or concealed, with a view to defraud the revenue, this would be an offense punishable under section 12 of said act of 1874. A forfeiture would also be incurred under section 2864 Rev. Stat. *Ibid.*
7. No provision exists giving the importer a right to make an addition to the value stated in the *pro forma* invoice permitted by the act of 1874. *Ibid.*
8. Where protests and appeals have been filed, and recognized as valid when filed, at a different time or in a different manner than that required by section 2931 Rev. Stat., by the mutual error of the customs officers and of the importer, it is not competent to the Treasury Department to recognize such protests and appeals as valid. (See *infra*, par. 17.) 197.
9. It is for the person entering the goods to see that the proper steps are taken to protect his right to prosecute his claim for a refund of duties if he desires such refund, and a mistake made by the customs officers or the Department cannot place him in such position that he can maintain an action without complying with the requirements of the law. *Ibid.*

CUSTOMS LAWS—Continued.

10. Suggestions in regard to the disposition of cases wherein the requirements of the law have been neglected, and in which suits have been commenced, but afterwards discontinued upon the understanding that the Department would proceed to refund duties found to have been illegally collected. 198.
11. Glass bottles in which importations are made, whether containing free or dutiable goods, are subject to duty, unless expressly exempted; the duty thereon being (under section 2504, Schedule B, Rev. Stat.) 30 per centum ad valorem where not otherwise provided for. 269.
12. Section 2504, Schedule E, Rev. Stat., providing for steel in coils, does not refer solely to the *form* in which the merchandise is imported, but is to be construed in connection with the commercial designation of the article. 315.
13. Under that schedule (which provides that "all articles of steel partially manufactured, or of which steel shall be a component part, not otherwise provided for, shall pay the same rate of duty as if wholly manufactured") steel wire partially manufactured should pay the same rate of duty as steel wire wholly manufactured. *Ibid.*
14. Where four cases, containing coins, clay figures, arms and implements of ancient origin (the coins not being arranged in "cabinets") were imported for sale by the importer in the regular course of his business: *Held* that the coins, if of gold, silver, or copper, are entitled to entry free of duty under section 2505 Rev. Stat., but that the other articles are not thus entitled. 353.
15. The words "all other collections of antiquities," as employed in the following clause of the free list contained in that section, viz, "Cabinets of coins, medals, and all other collections of antiquities," mean such collections as are *ejusdem generis* with the other articles mentioned in the same clause; and hence, where imported for sale, they must be of like character with coins and medals in order to be entitled to free entry. 354.
16. *Medals* are exempt from duty only when imported in cabinets. But, by virtue of another clause in the same section, all *coins* of gold, silver, or copper are exempt, without regard to the date of coinage, whether placed in cabinets or not. *Ibid.*
17. In view of the apparent conflict of opinion as to the time when protests and appeals in customs cases should be filed under section 2931 Rev. Stat., between the decision in the later case of *Keyser v. Arthur* (per Judge Shipman), in the United States circuit court for the southern district of New York, and the decision in the case of *Watt v. United States* (per Chief Justice Waite), in the same court, to which last-mentioned case reference is made in the opinion of the Attorney-General on the same subject, of October 31, 1878 (*ante*, p. 197), no objection is perceived to the Treasury Department following the rule that it has heretofore adopted in regard to protests and appeals in such cases. But it

CUSTOMS LAWS—Continued.

- is a question for the Supreme Court finally to determine, whether papers filed agreeably thereto constitute a protest and appeal within the meaning of the statute and can be treated as filed within the time required by the statute. 355.
18. In determining the duty to be assessed on ale, porter, and beer, under section 2504 Rev. Stat., schedule D, the word "gallon," as there used, is to be understood as meaning a gallon containing 231 cubic inches, known as the wine-gallon. 359.
 19. Wrought scrap-iron, consisting of punchings and clippings from iron used in the manufacture of boiler-plates, and which has never been used otherwise than in their manufacture, is not "waste or refuse iron that has been in actual use," within the meaning of the provision in schedule E, section 2504 Rev. Stat., imposing a duty of \$8 per ton on scrap-iron. 445.
 20. Such punchings and clippings are dutiable under another provision of that schedule, as iron in "forms less finished than iron in bars, and more advanced than pig-iron," &c. *Ibid.*
 21. The provision in section 2900 Rev. Stat., that the duty on imported merchandise "shall not * * * be assessed upon an amount less than the invoice or entered value," is applicable to entries under sections 9 and 10 of the act of June 22, 1874, chap. 391. 472.
 22. Photographic slides for use in a magic lantern, imported for an institution of learning, and designed solely for the instruction of its students, are entitled to free entry. Such importation is exempt from duty by either of two provisions, viz, section 2505 Rev. Stat., exempting "philosophical and scientific apparatus, instruments," &c., and the act of June 6, 1878, chap. 156. 486.
 23. The act of March 14, 1876, chap. 23, extending "the privileges of sections 2990 to 2997 of the Revised Statutes, inclusive" (i. e., the privilege of transportation in bond), to the port of Genesee, New York, is not repealed by the act of June 10, 1880, chap. 190, which repeals those sections and substitutes therefor other provisions. 548.
 24. The former act conferred upon the port of Genesee a right to participate in the privileges of the class of ports mentioned in section 2997, as defined in the other sections above referred to, and as they might thereafter be defined in any subsequent legislation to be substituted therefor. Accordingly, the privileges to which that port is now entitled are those set forth in the latter act for the same class of ports (the ports designated in section 7 of the act). *Ibid.*
 25. The expression "manufactures of cotton," as used in schedule A, section 2504 Rev. Stat., includes manufactures in which cotton is the component material of chief value. Fabrics of the latter description being thus enumerated articles, the similitude provision of section 2499 Rev. Stat. has no application thereto. Such fabrics are dutiable under Schedule A aforesaid. 648.

CUSTOMS LAWS—Continued.

26. In classifying articles for duty, the rule is that the process of enumeration must be exhausted before that of assimilation is resorted to. *Ibid.*
27. *Advised*, therefore, that the Treasury ruling of 1874—viz, that textile fabrics composed of silk and cotton in which cotton is not the component of chief value, if such fabrics be substantially the same in character and uses as silk, should be classified for duty at the rate imposed upon manufactures in which silk is the component of chief value, by virtue of the similitude clause in said section 2499—be modified agreeably to the foregoing view. *Ibid.*
28. The proper rate of duty chargeable upon "cut hoops," under section 3 of the act of June 30, 1864, chap. 171 (sec. 2504 Rev. Stat.; act of March 3, 1875, chap. 127, sec. 4), considered. 660.
29. Where certain cubebs, *produced* in a country east of the Cape of Good Hope, but *imported* from Rotterdam, in November, 1879, were entered at a value more than 10 per cent. below their true value: *Held* that the importation was liable to the additional duty of 20 per cent. ad valorem imposed by sec. 2900 Rev. Stat. 677.

See TREATIES WITH FOREIGN GOVERNMENTS, 4.

DAKOTA—PARDONING POWER OF GOVERNOR.

See PARDON, 3, 4.

DEPARTMENTAL PRINTING AND BINDING.

1. The provision in the sundry civil act of June 20, 1878, chap. 359, that "no books shall be printed and bound except when the same shall be ordered by Congress or are authorized by law," operates to prohibit the practice which theretofore existed (under *implied* authority of law) of printing and binding reports, &c., made in the course of Departmental business, and requires that thenceforth, for such printing and binding, there must be express statutory authorization. 57.
2. The printing and binding, at the Government Printing Office, of the book called "The American Ephemeris and Nautical Almanac," for the Navy Department, are within the appropriation made by the act of June 20, 1878, chap. 359, for printing and binding for that Department, and accordingly are authorized by law. 127.

DEPOSITARIES OF PUBLIC MONEY.

See SECRETARY OF THE TREASURY, 1.

DESERTING SEAMEN, RESTORATION OF.

Section 5280 Rev. Stat., which provides for the restoration of seamen deserting from vessels of foreign governments which have treaties with the United States stipulating therefor, applies only to cases of desertion that occurred while the vessel was in a port of the United States and wherein the person charged with desertion is not a citizen of the United States. 358.

DESERPTION.

1. Opinion of Attorney-General Taft, of September 1, 1876 (15 Opin., 152), in regard to the application to the offense of desertion of the limitation provided in the one hundred and third Article of War, the nature of that offense, and the time when the limitation begins to run in favor of the deserter, the scope and effect of the exception contained in that article preventing the limitation from running in certain cases, the operation of the forty-eighth Article of War with respect to the deserter's term of service, &c., reaffirmed. 170.
 2. The exception from the limitation contained in the one hundred and third Article of War (viz, when, by reason of having absented himself, or of some other manifest impediment, the accused shall not have been amenable to justice within the period mentioned) does not produce any effect where the limitation itself would not otherwise run. Hence absence without leave *during the term of enlistment*, in the case of a deserter, is unimportant, inasmuch as, the offense of desertion being a continuing one during such term, the limitation would not otherwise begin to run until the expiration thereof. *Ibid.*
 3. Where the absence of the deserter continues after his term of service has expired, no presumption of law arises that he was not amenable to justice during such absence, and that his case is accordingly within the exception. The fact must be shown by evidence submitted at the trial. *Ibid.*
 4. Nor is a plea of guilty, when it appears by the record that the order for trial was issued more than two years before the commission of the offense, to be taken as an admission by the accused of the existence of an exception withdrawing his case from the limitation. *Ibid.*
 5. It is for the prosecution to show as a matter of fact, in some other way than by the form of the pleadings, that by reason of having absented himself, or of some other manifest impediment, the accused was not amenable to justice within the two years. *Ibid.*
 6. Opinion of October 16, 1878 (see *ante*, page 170), relative to trial and punishment by court-martial of deserters from the military service (in which the conclusions of Attorney-General Taft, in the opinion given by him on that subject, dated September 1, 1876, were restated and concurred in), reaffirmed. 396.
- See ARMY, 22; STOPPAGE OF PAY, 1, 2,

DISMISSAL.

See COURT-MARTIAL, 12.

DISMISSED OFFICER, RIGHT OF, TO COURT-MARTIAL.

See ARMY, 17.

DISTRICT ATTORNEY.

See COMPENSATION, 4, 5, 6, 7.

DISTRICT OF COLUMBIA.

1. The Commissioners of the District of Columbia have not power under the act of June 11, 1878, chap. 180, to abolish the office of the fire commissioner, whose appointment is vested in the Secretary of the Interior by the law creating the office (the act of the legislative assembly of the District of Columbia, passed August 21, 1871). 179.
2. The holders of overdue coupons of the 8 per cent. certificates issued under an act of the legislative assembly of the District of Columbia, approved May 29, 1873, are entitled to interest thereon at the rate of 6 per cent. per annum; and such interest should be allowed by the Treasurer of the United States where such coupons are tendered in payment of taxes for special improvements within the said District. 515.
3. Upon consideration of the provisions of section 13 of the act of March 3, 1877, chap. 117, section 7 of the act of June 11, 1878, chap. 180, and section 3 of the act of March 3, 1879, chap. 182: *Held* that a previous requisition on the Secretary of the Treasury by the Commissioners of the District of Columbia is necessary to authorize a warrant for disbursing the sinking fund of the District by the Treasurer of the United States. 632.

DISTRICT OF COLUMBIA EIGHT PER CENT. CERTIFICATES.

See DISTRICT OF COLUMBIA, 2.

DISTRICT OF COLUMBIA 3.65 BONDS.

See INTERNAL REVENUE, 5, 7.

EASEMENT.

A right to send rays from a light-house across a private close, unobstructed by future erections thereon by the owner, is an easement which must be gained by the United States in the usual way, *i. e.*, by grant, express or implied, from the owner of the close. In the absence of such a grant by the owner, his right to build upon the close remains intact; and, if he is unwilling to make a grant, the United States are left to have recourse, under the law of eminent domain, to condemnation of the property for the public purposes involved. 631.

See LANDS, PUBLIC, 11, 12, 13.

EIGHT-HOUR LAW.

1. The circular of the Navy Department of March 21, 1878, announcing that "the Department will contract for the labor of mechanics, foremen, leading men, and laborers on the basis of *eight hours a day*," but that all workmen "electing to labor ten hours a day will receive a proportionate increase of their wages," is in accordance with section 3738 Rev. Stat., embodying what is commonly known as the eight-hour law. 58.
2. That section prescribes the length of time which shall amount to a day's work, when no special agreement is made upon the subject. It does not forbid the making of contracts fixing a different length of time as the day's work. *Ibid.*

EMINENT DOMAIN.

See NAVIGABLE WATERS, LAND UNDER, 3, 4.

ENGINEERS, CIVIL, IN THE NAVAL SERVICE.

1. In December, 1876, the President nominated W. to be a civil engineer in the Navy *vice* G., removed, and the nomination was confirmed by the Senate January 9, 1877, on which date he was also commissioned by the President. No notice was sent to G. of his removal or of the appointment of W. in his place. 203.
2. From the terms of the act of March 2, 1867, chap. 172 (section 1413 Rev. Stat.), providing for the appointment of civil engineers, it is to be implied that the service of such officer may be dispensed with when necessary. The appointment is local in its character. *Ibid.*
3. Although, under section 9 of the act of March 3, 1871, chap. 117 (section 1478 Rev. Stat.), the President was given a discretionary power to confer relative rank upon civil engineers, this power has never been exercised; and they have no rank by which their relation to the officers or men in the Navy can be determined. *Ibid.*
4. *Held*, accordingly, (1) that civil engineers (in the absence of any action by the President conferring upon them relative rank) are not to be considered naval officers, but civil officers; (2) that it was competent to the President, if he deemed the further continuance of G. in the service not advisable, to nominate W. in his place; (3) the confirmation and appointment of W. operated to remove G., and the fact that the latter received no notice of his dismissal is unimportant. Opinions of August 19, 1876, and September 5, 1876 (15 Opin., 165, 597), referred to and commented on. *Ibid.*

ENLISTMENT FOR DURING THE WAR.

See ARMY, 26.

ENROLLMENT AND LICENSE OF VESSELS.

1. The act of April 18, 1874, chap. 110, does not exempt from the license required by section 4371 Rev. Stat. a vessel of more than five tons burden, answering to the description of a canal-boat which is engaged in trade between different ports or districts on navigable waters of the United States, and which has never been used on a canal, was not intended to be used there, and does not in its present employment enter a canal. Opinion of October 19, 1875 (15 Opin., 52), to that extent, overruled. 247.
2. It is the *use* made of the vessel, not its mechanical structure, which determines whether it is or is not entitled to the exemption allowed by that act. *Ibid.*
3. The provision in the act of June 30, 1879, chap. 54, which exempts from enrollment, registration, or license "any flat-boat, barge, or like craft for the carriage of freight, not propelled by sail or by internal motive power of its own, on the rivers or lakes of the

ENROLLMENT AND LICENSE OF VESSELS—Continued.

United States," has reference solely to vessels of that description built within the United States and owned by citizens thereof. It does not extend to foreign-built craft. 563.

4. *Held*, accordingly, that barges of the above description, of twenty tons burden or upward, built in Canada but owned by American citizens, are liable to the payment of tonnage as prescribed by section 4371 Rev. Stat., when found trading between district and district. *Ibid*.

EVIDENCE.

See EXTRADITION; INTERNAL REVENUE, 3.

EXAMINER OF STATE CLAIMS.

See WAR DEPARTMENT.

EXCHANGE OF GOLD AND SILVER.

The provisions of section 3651 Rev. Stat. in effect prohibit the exchange of gold and silver coin for United States notes by the Treasurer, assistant treasurers, and other depositaries of public funds. 381.

EXTRADITION.

Evidence of insanity is admissible in proceedings before a United States commissioner for the extradition of one who is charged with an extraditable offense under the treaty of 1849 with Great Britain and section 5320 Rev. Stat., to explain what has been proved in support of the charge. 642.

FERRY.

See TERRITORIES, 1, 2, 3.

FORFEITURE.

1. Where an act is committed by the owner of a distillery by which a forfeiture thereof is incurred under the revenue laws, and subsequently the owner conveys the property to an innocent purchaser without notice of the commission of the act, the property remains still subject to the forfeiture incurred. The conveyance, in such case, passes no title as against the United States. 41.
2. Where a vessel was condemned and sold by decree of a United States court as a forfeiture under section 2874 Rev. Stat., for landing after sunset certain cases of foreign gin and brandy valued at more than \$400, the proceeds of the sale being still retained subject to the orders of the court: *Held* that the owner and a mortgagee of the vessel are persons who incurred the forfeiture within the meaning of sections 17 and 18 of the act of June 22, 1874, chap. 391, which authorize the Secretary of the Treasury, after certain proceedings had, to remit such forfeiture "if in his opinion the same shall have been incurred without

FORFEITURE—Continued.

willful negligence or any intention of fraud in *the person or persons incurring the forfeiture.*" 473.

See COMMISSIONER OF INTERNAL REVENUE, 2, 3; LANDS, PUBLIC, 14; WEST POINT, RIGHT OF WAY OVER GOVERNMENT LAND AT, 5.

FORT BROWN, TEXAS.

In 1853 certain proceedings were instituted in the district court for Cameron County, Texas, under an act of the legislature of that State, for the purpose of acquiring title to the site of Fort Brown, Texas, then occupied by the United States as a military post; but no authority for the institution of these proceedings was ever given by Congress. The value of the land was assessed by verdict of a jury at \$50,000, but no judgment was then entered up. Long afterwards, on February 20, 1879, the court rendered a judgment, based on the verdict of the jury in 1853, for the sum above mentioned, with interest thereon from the year 1853. Suggestion being made that steps should now be taken in behalf of the United States to have the judgment annulled by a superior court: *Advised* that this is unnecessary, for the reason that, as no officer of the United States had authority to institute or appear in said proceedings and submit its rights to adjudication, the Government cannot be bound by them, and that proceedings to oust the United States from the possession of the premises could not be maintained. 465.

FORT PORTER MILITARY RESERVATION.

Where certain land (now constituting part of the Fort Porter Military Reservation at Buffalo, N. Y.) was granted to the United States under an act of the legislature of New York, dated February 28, 1842, "for military purposes, reserving a free and uninterrupted use and control in the canal commissioners of all that may be necessary for canal and harbor purposes": *Held* that the right of the State, under the reservation in the grant, is limited by the purposes of the grant, and that the State is not entitled to use the land for any purpose, if thereby its use for the military purposes of the United States will be interfered with; yet that the State has a right to use so much of the land as may be necessary for canal and harbor purposes, where such use does not interfere with its use for the military purposes of the Government. Accordingly, *held* that the Secretary of War may permit the State of New York to use so much of the premises for canal purposes as will not interfere with the use thereof for military purposes. 592.

FORT SNELLING, BRIDGE AT.

- 1. The act of June 20, 1878, chap. 359, appropriating \$65,000 to aid in the construction of a bridge at Fort Snelling, Minnesota, contemplates a supervision of the work as it progresses by the Gov-

FORT SNELLING, BRIDGE AT—Continued.

ernment, to determine whether it is done in accordance with the plan and specifications approved by the Secretary of War. 125.

2. The incidental expenses of the officer or officers detailed for that purpose (there being no special provision made therefor) are to be defrayed in the manner that similar expenses in analogous cases are met. *Ibid.*

FOX AND WISCONSIN RIVERS IMPROVEMENT.

It is not obligatory upon the United States, as proprietor of the line of water communication between the Fox and Wisconsin Rivers formerly owned by the Green Bay and Mississippi Canal Company, to maintain the draw-bridge over the Portage Canal, located at Wisconsin street, in the city of Portage, Wis., where that street crosses the canal and intersects De Witt street. 424.

FRANKING PRIVILEGE.

Members-elect of either house of Congress are, under section 7 of the act of March 3, 1877, chap. 103, entitled to exercise the privilege of franking public documents as soon as the term for which they were elected commences, although no session of the Congress has convened and they have not qualified. The language used in that section is to be construed with reference to similar legislation formerly existing (of which a review is given in the opinion), and must be interpreted as intended to restore the franking privilege, so far as it relates to public documents, for the term for which the members are elected, with the additional period therein stated. 271.

FREIGHT.

See TRANSPORTATION, ARMY.

FUEL FOR ARMY OFFICERS.

See ARMY, 5, 6.

GENESEE, PORT OF.

See CUSTOMS LAWS, 23, 24.

GRADUATE.

See NAVAL ACADEMY, 1, 2.

GRADE, RANK, AND TITLE.

See NAVY, 8.

HOLDING TWO OFFICES.

See COMPENSATION, 1.

HOMESTEAD.

See MISSOURI MILITIA, 3.

HONORABLE DISCHARGE.

See MISSOURI MILITIA, 2.

ICE HARBOR AT MOUTH OF MUSKINGUM RIVER.

See SECRETARY OF WAR, 2, 3.

IMPROVEMENT OF NAVIGABLE WATERS.

1. The property of an individual in a bar or other part of the bed of a navigable river is subject to the public right of navigation, and to the right of the public to regulate, control, and divert the flow of the water therein in the interests of navigation; and where the stream is a navigable river of the United States, the right thus to regulate, control, and divert the flow of water belongs to Congress. Damage resulting to the individual proprietor from the exercise of that right is not a proper subject of compensation. 479.
2. Accordingly, where it was proposed to construct a dike in the Ohio River to improve its navigation (under an appropriation by Congress for the improvement of that river), extending from the shore on the south side of the river into the middle of the stream, crossing a sand bar at the outer extremity, which is under water at all times except when the river is at its low-water level or within a few feet thereof: *Advised* that the United States would incur no liability to the owner of the sand bar by reason of any washing away of the same, or other damage thereto resulting from the construction of the dike; that the right of the United States thus to occupy the bar for the improvement of navigation is paramount to the right of the owner, and must prevail over the claims of the latter. *Ibid.*
3. Where certain parties, claiming the land formed by accretion along the line of the piers erected by the United States at the mouth of Grand River, Ohio, proposed to sell the same with the river frontage bordering thereon for railroad purposes—the design of the party proposing to purchase being to build on the premises substantial docks upon such lines as the Government shall indicate: *Advised* that such river frontage is affected by the rights of the United States only so far as the navigation of the river and the maintenance of works constructed for the improvement thereof are concerned; that those rights do not preclude the owner from making any use of his property which does not obstruct the one or interfere with the other of these objects; and that the intended use of the river frontage by the purchaser (in view of the report of the engineer officer in charge) would not conflict with any right of the United States in the premises. 486.
4. By the act of June 14, 1880, chap. 211, Congress made an appropriation for the improvement of Oakland harbor, in California, and provided that the same should not be available “until the right of the United States to the bed of the estuary and training-walls of this work is secured, free of expense to the Government, in a manner satisfactory to the Secretary of War.” The estuary here referred to is a navigable water of the United States, and the training-walls of the work are located on the shore below high-water mark. *Held* (1) that the statute does not contemplate that the United States shall have necessarily an

IMPROVEMENT OF NAVIGABLE WATERS—Continued.

absolute title to the bed of the estuary and to such portions of the shore as are occupied by the training-walls; (2) that under the power to regulate commerce—a power which includes that of regulating and improving navigable waters—the United States now have a right (which is deemed sufficient in this case) to use the bed and shore of the estuary for the purposes of said improvement by erecting training-walls or any other appropriate structure thereon, and that the proprietor of the soil can make no complaint of such use. 534.

INDEMNITY.

See LANDS, PUBLIC, 18, 19, 20, 23, 26, 27, 28.

INDIAN AGENT.

Where process was issued by a court of the State of Colorado for the arrest of an Indian agent who was charged with the commission of a crime against the laws of the State: *Advised* that he (being within the territorial limits and jurisdiction of the State, although upon an Indian reservation) is subject to the process of the State, and that he cannot be sustained in resisting the same. 571.

INDIANS AND INDIAN LANDS.

1. The case of a proposed deed by one Pe-wo-mo, a Pottawatomie Indian, covering part of the tract reserved to Billy Caldwell (under whom the said Indian claimed title by inheritance) by the treaty of July 29, 1829, with the Chippewa, Ottawa, and Pottawatomie Indians, considered in connection with an application to the President for his approval of the deed; and also certain inquiries, viz, as to the right of Pe-wo-mo in the premises, the execution of the papers, and the authority of the President to approve the deed, answered. 310.
2. Proposed deed of Pe-wo-mo, a Pottawatomie Indian, granting certain land near Chicago, Ill., considered with reference to objections suggested by the Commissioner of Indian Affairs. *Advised* that the President, when satisfied that the consideration is a fair one, should approve the deed and transmit it to the Indian Bureau with directions that the Commissioner deliver the same upon satisfactory evidence that the consideration has been either paid or secured to the Indian. 325.
3. A trader at a military post in the Indian country cannot lawfully maintain a traffic with the Indians unless he be properly licensed for such trade. 403.
4. License to trade with the Indians at the establishments of post-traders cannot be given by the military authorities. *Ibid.*
5. In executing certain treaties with the Cherokee Nation providing for the removal of intruders, the Government is not bound to regard simply the Cherokee law and its construction by the

INDIANS AND INDIAN LANDS—Continued.

counsel of the Nation, but the Department required to remove alleged intruders must determine for itself, under the general law of the land, the existence and extent of the exigency upon which such requirement is based. 404.

6. The Navajo Indians having offered to co-operate with the United States troops against the Apaches if the military authorities will arm and subsist them: *Advised* (concurring with the view of the General of the Army) that no statutory provision exists under which said Indians can be armed and subsisted as proposed. 451.
7. Under article 16 of the Cherokee treaty of 1866, the lands west of the ninety-sixth degree of longitude, to which it refers, are reserved to the United States, upon the conditions there named, for the settlement thereon of tribes of friendly Indians. The possession of and jurisdiction over these lands until thus disposed of, which are retained by the Cherokee Nation under the same article, give to that nation no right to settle its citizens upon the lands so long as the right reserved by the United States to settle friendly Indians thereon subsists. Hence authority to settle there, derived from the Cherokee Nation, is not sufficient. 470.
8. *Held*, accordingly, where certain persons claiming to belong to the Cherokee Nation attempted to settle upon the lands mentioned, that their removal therefrom by the military authorities was justifiable. *Ibid.*
9. By the act of June 14, 1880, chap. 211, an appropriation is made for the construction of a dam at Lake Winnibigoshish, with a proviso "that all injuries occasioned to individuals by overflow of their lands shall be ascertained and determined by agreement or in accordance with the laws of Minnesota, and shall not exceed in the aggregate \$5,000." The land to be overflowed, as is ascertained by actual survey, lies within the limits of the reservation of the Chippewa Indians, secured to that tribe by the treaty of February 22, 1855. *Held* that the said proviso, being in terms limited to the lands of individuals, cannot be extended to lands of the Chippewa tribe, and that Congress has not otherwise, in said act, manifested an intention to exercise the right of eminent domain in or upon lands in said Indian reservation, or to authorize the overflow of any part of that reservation, or the taking of timber or materials therefrom. 552.
10. *Seem* that where any stock of horses, mules, or cattle are driven or conveyed so near to Indian lands that from the nature and habit of the animals they will probably go upon such lands, especially where the circumstances show an intent on the part of the person so driving or conveying to have them go there, if the cattle should be found upon the lands without the consent of the tribe, such person would be liable to the penalty imposed by section 2117 Rev. Stat. To incur that penalty, it is not necessary that the stock be actually driven upon the Indian lands; it is sufficient if they are so driven as to "range and feed" thereon. 562.

INJUNCTION.

1. Where an injunction was issued by the supreme court of the State of New York enjoining the depot quartermaster at New York City from paying to a contractor certain funds due him for the construction of certain quarters at David's Island, in New York harbor: *Held* that the injunction is inoperative as against the quartermaster. 257.
2. It is not competent to the State courts to enjoin officers of the Executive Departments from executing the lawful orders thereof, whether they concern the payment of money for the performance of contracts with the United States or any other matter. *Ibid.*
3. In the above case, however, from considerations of comity between the State and National Governments: *Advised* that (before determining whether or not payments should be made notwithstanding the injunction) application be made to the court for a dissolution of the injunction so far as the quartermaster is concerned. *Ibid.*

INSPECTION, CERTIFICATE OF.

See VESSEL, 2.

INSPECTOR-GENERAL'S CORPS.

See ARMY, 23.

INTERNAL REVENUE.

1. The stockholders of a corporation engaged in the business of distilling cannot properly be accepted as sureties upon the bond required of the corporation by section 3293 Rev. Stat., even if their individual liability for the debts of the corporation is, by the terms of the charter, limited to the amount of their stock. Such stockholders being already jointly and severally liable, under the provisions of section 3251 Rev. Stat., for the taxes imposed upon the spirits manufactured by the corporation, no additional security for the payment thereof would be gained by their suretyship. 10.
2. The liability imposed upon the stockholders by the internal-revenue law is a liability distinct from that which they are under as such to the public with whom the corporation deals; it is a liability imposed by reason of the business in which the corporation whereof they are stockholders is engaged. *Ibid.*
3. The defendants in a suit on a distiller's bond, instituted for the recovery of internal-revenue taxes assessed under section 3253 Rev. Stat., have no legal right to the use at the trial of the reports, documents, and other papers on file in the office of the Commissioner of Internal Revenue, upon which the Commissioner acted in making the inquiries and determinations contemplated by section 3182 Rev. Stat., and from which he derived the information that, in whole or in part, formed the basis of the assessment. Nor has the court authority to compel the production of such papers. 24.

INTERNAL REVENUE—Continued.

4. Upon consideration of the following sections of the Revised Statutes, namely, sections 3236, 3244, 3362, 3363, 3387, 3390, and 3392: *Held* that the manufacture of cigars and tobacco, and the sale of cigars and manufactured tobacco at retail, cannot be lawfully carried on at the same time in the same place—that the manufacturer of these articles is not authorized to sell from broken packages, under a retail dealer's license, at the place of manufacture. 89.
5. The bonds known as the "District of Columbia 3.65 bonds" are obligations of the United States, for the payment of which the faith of the Government is solemnly pledged. But those bonds are not "United States bonds" within the meaning of sections 5214 and 5215 Rev. Stat. 173.
6. The duty imposed on every national banking association by section 5214 Rev. Stat., of "one-quarter of one per centum each half year on the average amount of its capital stock beyond the amount invested in United States bonds," is a tax upon the *franchise* of the bank, not a tax upon its capital stock. Hence, in determining the quantum of such tax payable by the bank, no deduction can be made from its capital stock of the amount thereof which is invested in any non-taxable property that does not fall under the description of "United States bonds" within the meaning of the statute. 174.
7. *Held*, accordingly, that a national banking association, in making returns of the average amount of its capital stock, &c., under section 5215 Rev. Stat., should not be allowed to deduct the amount of capital invested in "District of Columbia 3.65 bonds," although these bonds are, by section 7 of the act of June 20, 1874, chap. 337, "exempt from taxation by Federal, State, or municipal authority." *Ibid*.
8. In determining "the average amount invested in United States bonds," under the provisions of section 3408 Rev. Stat., imposing a tax upon the capital employed in the business of banking, and "the amount invested in United States bonds," under the provisions of section 5214 Rev. Stat., imposing a semi-annual duty on national banking associations, the amount thus "invested" is in either case to be ascertained by taking the price actually paid for the bonds. But within the price accrued interest should not be computed, that being a mere temporary investment, which is replaced as soon as the interest becomes due and payable. 187.
9. Where internal-revenue taxes were paid by a railroad company on dividends of its stock owned by a State, and no application has been made by the company, within the time limited by statute, for a refund: *Held* that the Commissioner of Internal Revenue has no authority to allow the amount so paid to be applied by way of set-off in discharge of a liability of the company for taxes arising upon a subsequent assessment. 248.

INTERNAL REVENUE—Continued.

10. Nor has he authority, with the concurrence of the Attorney-General and the Secretary of the Treasury, to compromise a tax legally due from such company (the same being solvent) for a sum less than the amount of the tax. The authority to compromise conferred by section 3229 Rev. Stat. does not permit the voluntary relinquishment of a part of a tax lawfully assessed upon and due from a solvent person or corporation. 249.
11. The obligations issued by the Philadelphia and Reading Railroad Company, called "Wages Certificates," in sums of \$10 each, payable in money to the bearer thereof, and receivable in payment of debts due the company (a copy of which instrument is given in the opinion), are "notes used for circulation" within the meaning of sections 19 and 21 of the act of February 8, 1875, chap. 36, and subject to taxation thereunder. 341.
12. *Seem* that certain obligations issued by Knapp, Stout & Co., of similar character, payable in merchandise, are within the mischief intended to be remedied by that act; wherefore it is *advised* that the tax be exacted upon them, as it has heretofore been, under the sections aforesaid. *Ibid*.
13. A dealer in cigars would not be liable to any penalty under existing laws (see sections 3397 and 3406 Rev. Stat.) for refusal or neglect to detach the coupons from the stamp known as the Hamilton-Brooks stamp, *at the time* contemplated by that device, should such stamp be adopted in pursuance of the provisions of section 3446 Rev. Stat., as amended by section 18 of the act of March 1, 1879, chap. 125. He would under existing laws incur liability for not destroying the stamp when the box is emptied, but not for refusal or neglect to do so previously thereto. 443.
14. The "tax on deficiency" in the quantity of distilled spirits exported, when compared with the quantity withdrawn for exportation (see acts of June 9, 1874, chap. 259, and March 1, 1879, chap. 125), may be collected by distraint upon the property of the withdrawer of the spirits, as well as by suit upon the transportation bond. 634.
15. Such tax is secured by a lien, under the general provision contained in section 3186 Rev. Stat., upon all the property of the person liable therefor. The special provisions found in section 3251 Rev. Stat. do not forbid the application of the general provision of section 3186 to all cases where there is nothing in such special provisions to contradict. *Ibid*.
16. The receipt of the ascertainment of deficiency by the collector of internal revenue from the collector of customs is, in effect, his receipt of an assessment list of the tax, within the meaning of section 3186, as amended by the act of March 1, 1879, chap. 125. *Ibid*.
17. In the winter of 1866-'67, R. purchased a large quantity (1,777 barrels) of distilled spirits in bond, which were not withdrawn from warehouse until May, 1869. Upon their withdrawal therefrom

INTERNAL REVENUE—Continued.

the internal-revenue tax was exacted on the whole quantity originally deposited in the warehouse, without allowance for leakage (which amounted to about 13,000 gallons) whilst there. R. subsequently made application to the Commissioner of Internal Revenue, under section 3220 Rev. Stat., for repayment of so much of the tax which was exacted as covered the amount of spirits lost by warehouse leakage, claiming that to this extent such tax was "wrongfully collected." *Held* that under the provisions of the internal-revenue laws in force at the time (acts of July 13, 1866, chap. 184, and July 20, 1868, chap. 186) the tax was chargeable upon spirits in warehouse according to the quantity originally deposited therein, without regard to leakage, and that, the tax in the above case upon the whole quantity originally deposited being therefore exacted *pursuant to law*, there was in the collection thereof "nothing wrongful" within the meaning of section 3220 Rev. Stat., and accordingly the case is not one wherein the Commissioner is authorized by that section to refund. 667.

INTRUDERS, REMOVAL OF.

See INDIANS AND INDIAN LANDS, 5, 7, 8.

IOWA RAILROAD LAND-GRANT.

See LANDS, PUBLIC, 21, 22.

JURISDICTION.

See CESSION OF JURISDICTION; COURT-MARTIAL, 1, 2, 3, 4, 7, 17, 18; NATIONAL CEMETERY.

KANSAS AND NEOSHO VALLEY RAILROAD.

See LANDS, PUBLIC, 9; MISSOURI RIVER, FORT SCOTT AND GULF R. R. Co., 1, 3.

KANSAS PACIFIC RAILWAY COMPANY.

See TRANSPORTATION, 2.

KANSAS SCHOOL-LANDS.

See LANDS, PUBLIC, 18, 19, 20.

KENTUCKY RIVER IMPROVEMENT.

See SECRETARY OF WAR, 4.

LAND, ACQUISITION OF.

1. The discretion given by the act of May 21, 1872, chap. 83, to acquire, either by purchase or by condemnation, a lot of ground in the city of Fall River, Mass., suitable for a site for a public building, does not extend to the acquisition of "adjoining land" referred to in the act of March 3, 1879, chap. 182. The authority

LANDS, ACQUISITION OF—Continued.

- to "purchase" given by the latter act does not include authority to acquire by condemnation. 326.
2. Generally, in statutes as in common use, the word "purchase" is employed in a sense not technical, only as meaning acquisition by agreement with and conveyance from the owner, without governmental interference. *Ibid.*
 3. In acquiring a site for a movable beacon or bug-light, under the appropriation made therefor by the act of March 3, 1879, chap. 182, the purchase from the owner of the beach of a perpetual right to occupy such parts thereof for that purpose as circumstances may from time to time require, is sufficient. 328.

LAND-GRANT ROAD.

See TRANSPORTATION, 3, 4, 5.

LANDS ACQUIRED IN SATISFACTION OF JUDGMENTS.

1. The Commissioner of Internal Revenue is not authorized by law to take charge of lands acquired by the United States in satisfaction of judgments recovered on the official bonds of collectors of internal revenue, and, with the approval of the Secretary of the Treasury, to dispose of the same by sale or otherwise. 143.
2. Sections 3624, 3625, and 3217 Rev. Stat. (the last-mentioned section applying solely to collectors of internal revenue) have for their object the enforcement of the liabilities of officers who are accountable for public money; and though extending to revenue officers, they cannot properly be regarded as revenue laws. *Ibid.*
3. Hence, real estate, acquired by virtue of proceedings thereunder against a collector of internal revenue, cannot be considered as acquired "in payment of debts arising under the laws relating to internal revenue" within the meaning of section 3208 Rev. Stat. The provision in that section just adverted to refers to real estate acquired in payment of fines, taxes, penalties, and forfeitures incurred under the internal-revenue laws. 144.
4. The Solicitor of the Treasury, by virtue of sections 3749 and 3750 Rev. Stat., has charge of, and, with the approval of the Secretary of the Treasury, power to rent or sell lands acquired in satisfaction of judgments on bonds of internal-revenue collectors. *Ibid.*

See COMMISSIONER OF INTERNAL REVENUE, 2, 3.

LANDS, PUBLIC.

1. The words "or are otherwise defective or invalid," as used in the second section of the act of March 1, 1877, chap. 81, relating to indemnity school selections in the State of California, refer to indemnity selections which are invalid or defective for some other reason than that the lands in lieu of which they were made are not included within the final survey of a Mexican grant. Thus, where a selection made by the State was of land then in reserve, and the selection was for that reason defective

LANDS, PUBLIC—Continued.

- or invalid, the words quoted above apply to this case, and such selection is confirmed by said act to the State. 69.
2. Where there was no sixteenth or thirty-sixth section, in lieu of which an indemnity selection has been made, no title to the land embraced by such selection passes to the State. *Ibid.*
 3. *Seem* that where two or more indemnity selections have been made in lieu of the same sixteenth or thirty-sixth section, the State is entitled to but one of the indemnity selections; there being nothing in the act of March 1, 1877, from which it can be fairly inferred that double selections were meant to be ratified, and that the State should thus obtain a greater quantity of land than had originally been allowed by law for school purposes. *Ibid.*
 4. The act of July 27, 1866, chap. 278, made a grant of lands to the Southern Pacific Railroad Company (of California) which would acquire precision only upon the location of the line of the road. But the line designated upon the map filed by the company in the Interior Department, January 3, 1867, was a line which, at the time, it had no authority to adopt, although subsequently (by an act of the California legislature of April 4, 1870) such authority was obtained by it. Hence the grant did not, upon the filing of that map, become attached to any of the lands along the line designated thereon. 80.
 5. The company was subsequently authorized, by the resolution of June 28, 1870, to construct its road upon the line indicated by the map filed as aforesaid; and thus it was enabled to place the grant upon lands along the line so indicated. *Ibid.*
 6. The withdrawals of lands along the line designated upon said map (by order of Secretary Browning, March 19, 1867, and August 20, 1868, and by order of Secretary Cox, December 15, 1868, and July 26, 1870) were made by competent authority, and the lands thereby put in a state of reservation, so that no legal rights therein could be acquired under the general land laws. *Ibid.*
 7. But the resolution of June 28, 1870, expressly saves and reserves all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of the act of July 27, 1866, chap. 278. By this saving clause it was intended that actual settlers then upon the lands, in addition to those who were rightfully pre-emptors and homesteaders, should have their equitable rights respected, and be allowed, upon making proper proof of their actual settlement, to obtain title to their lands under the general land laws. *Ibid.*
 8. On April 27, 1869, the lands within the limits of Camp Wright, in California, were set apart as a military reservation by order of the President. That order was revoked by a subsequent order of the President, dated July 26, 1876, which reserved said lands for the use and occupancy of the Indians of the Round Valley Indian Reservation. The limits of the latter reservation were defined by and under the act of March 3, 1873, chap. 333, and

LANDS, PUBLIC—Continued.

- the lands of Camp Wright outside of those limits. *Held* that the limits of the Indian reservation cannot be enlarged by the President by annexing said lands thereto; but that the President may permit said lands to be used in connection with such reservation, so long as no action is taken by Congress for their disposal. 121.
9. The words "restored to market," in section 3 of the act of March 3, 1877, chap. 125, entitled "An act to secure the rights of settlers upon certain railroad lands," &c., are controlled by the last clause in same section, viz, "and opened to settlement and purchase under the homestead laws of the United States only." Those words, taken in connection with this clause, signify nothing more than a withdrawal of the lands from the condition of reservation in which they have been held by reason of the railroad grant referred to in the first section of the act. 181.
 10. The act of May 26, 1824, entitled "An act to authorize the State of Indiana to open a canal through the public lands to connect the navigation of the rivers Wabash and Miami of Lake Erie," examined and considered with reference to the subject of whether there has been a forfeiture of the right of way (including ninety feet on each side of the canal) granted to the State of Indiana by said act, and, if so, whether the United States can now assert any claim to the lands covered by said right of way. 250.
 11. The provision in the first section of said act, namely, that "ninety feet of land, on each side of said canal, shall be reserved from sale on the part of the United States, and the use thereof forever be vested in the State aforesaid, for a canal, and for no other purpose whatever," is a grant not of the land within ninety feet on each side of the canal, but of an easement therein, which is restricted to a particular purpose, the fee remaining in the United States. *Ibid.*
 12. Where the legal subdivisions out of which that estate was carved were sold or granted by the Government, the purchaser or grantee took the title thereto subject to the easement, unless the ninety feet "on each side of said canal" were excepted out of the patent. *Ibid.*
 13. *Seemle* that in patenting these subdivisions no such exception was made; and therefore the United States no longer have any interest in the lands subject to the easement; but upon forfeiture of the easement the absolute property in such lands would become vested in the patentees. *Ibid.*
 14. A forfeiture may be declared (either by judicial proceedings authorized by law or by legislative act) in case the lands have ceased "to be used and occupied for the purpose of constructing and keeping in repair a canal, suitable for navigation"; but it can only be declared by or in behalf of the United States. Congress may in such case declare the forfeiture, or direct that proper

LANDS, PUBLIC—Continued.

legal proceedings be instituted to the end of having it declared *Ibid.*

15. Patents may be issued to the State of Minnesota, under the land-grant act of July 4, 1866, chap. 168, for lands opposite that part of the railroad line from Houston, &c., to the western boundary of the State which has been constructed in ten-mile sections *since* February 26, 1877 (the date at which, in the event the railroad was not completed, it was provided by section 4 of said act that the lands not patented should revert to the United States), no action, legislative or judicial, having been taken to revest the lands in the United States. 397.
16. The provision in that section, adverted to, is a condition subsequent, and does not work a forfeiture of the grant and revest the lands in the United States until proceedings, either legislative or judicial, are had to enforce it. *Ibid.*
17. A location of said railroad line was made in 1866, after the passage of said land-grant act, and maps thereof were transmitted by the governor to the Secretary of the Interior in December of that year. The act of the State legislature accepting the grant was not passed until February 25, 1867, and it required the line to be run to Fremont and thence to Jackson, which involved a deviation from the location of 1866. The constructed road deviates from that location only to such extent as was necessary to conform to the requirement of the last-mentioned act. *Held* (1) that the road cannot be regarded as having received an official definite location until after the act of acceptance, which required a modification of the original location; (2) that the Secretary of the Interior should accept proof of the construction of the road *upon the line as modified in accordance with the act of acceptance. Ibid.*
18. By article 2 of the treaty of December 29, 1835, with the Cherokee tribe of Indians, certain lands, now situate within the boundaries of the State of Kansas, estimated to contain 800,000 acres, were sold and conveyed to said tribe in consideration of \$500,000. Subsequently, by the treaty of July 19, 1866, with said tribe, the same lands (known as the "Cherokee neutral lands") were ceded to the United States in trust to be sold for the benefit of said Indians, and in accordance with that treaty and the supplemental treaty of April 27, 1863, were surveyed and subdivided as are the public lands, and sold, and the proceeds placed to the credit of said Indians. *Held* (1) that under the sale and conveyance by the treaty of 1835 the Cherokee tribe of Indians acquired a title in fee-simple to the said lands, which thereupon ceased to be public lands of the United States; nor did they afterwards become public lands by reason of their cession to the United States by the treaty of July 19, 1866; (2) that neither section 34 of the act of May 30, 1854, chap. 59 (which *reserved* for school purposes the sixteenth and thirty-sixth sections in each township of public lands in the Territory of Kansas, when the same

LANDS, PUBLIC—Continued.

were surveyed preparatory to bringing them into market), nor section 3 of the act of January 29, 1861, chap. 20 (which *granted* to the State of Kansas "sections numbered 16 and 36 in every township of public lands in said State" for the use of schools, and provided for indemnity "where either of said sections, or any part thereof, has been sold or otherwise disposed of"), could have any effect upon the said lands of the Cherokees; (3) that the State of Kansas is not entitled, under the provisions of the school-land grant contained in the act of January 29, 1861, to indemnity for the sixteenth and thirty-sixth sections falling within townships into which the said lands of the Cherokees were subdivided and sold as aforesaid. 430.

19. The United States, by treaty with the Delaware Indians dated September 24, 1829, granted to that tribe certain lands lying in the fork of the Kansas and Missouri Rivers, and now within the boundaries of the State of Kansas, for their permanent residence, pledging "the faith of the Government to guarantee to the said Delaware Nation forever the quiet and peaceable possession and undisturbed enjoyment of the same against the claims and assaults of all and every other people whatever." By a subsequent treaty, which took effect July 17, 1854, the same tribe ceded to the United States all of said lands (excepting a certain part theretofore sold to the Wyandots, and also excepting a certain other part specifically described) to be surveyed and sold, the proceeds, after deducting cost of surveying, &c., to go to the tribe. The lands thus ceded were surveyed, and were principally sold during the year 1856; and afterwards, under the provisions of a treaty with the Delawares, dated May 30, 1860, a portion of the tract excepted from the cession of July 17, 1854, and retained by the Delawares, was sold to the Leavenworth, Pawnee and Western Railroad Company. The whole of the lands sold under the treaties of 1854 and 1860 contained upwards of thirty townships. *Held* (1) that the grant to the Delawares, by the treaty of 1829, conveyed only a right of occupancy (*i. e.*, the ordinary Indian title), the fee remaining in the United States—the lands thus continuing to be public domain, but subject to the Indian title; (2) that the lands covered by that grant came within the scope of section 34 of the act of May 30, 1854, chap. 59, though its operation upon them was liable to be indefinitely postponed by reason of the existence of the Indian title, or to be prevented by measures necessary to be taken in order to extinguish the Indian title; (3) that section 3 of the act of January 29, 1861, chap. 20, should be construed in connection with section 34 of the act of 1854, both sections being *in pari materia*, and that when thus construed it must be deemed that the grant to the State for school purposes made by said section 3 was meant to be as broad as the reservation for the same purposes contained in said section 34; (4) that, there-

LANDS, PUBLIC—Continued.

fore, the indemnity provision in the *grant* applies to such sixteenth and thirty-sixth sections as constituted a part of the public domain at the date of the *reservation* and were within its scope; and hence it is applicable to sections 16 and 36 in those townships within the lands of the Delawares which were disposed of under the provisions of the beforementioned treaties of 1854 and 1860; (5) that the State of Kansas is accordingly entitled to indemnity for the sixteenth and thirty-sixth sections within the townships last mentioned. 431.

20. By a treaty with the Kickapoo Indians, dated October 24, 1832, certain lands, now within the boundaries of the State of Kansas, were set apart as a permanent place of residence for that tribe. By a subsequent treaty with the same Indians, dated May 18, 1854, those lands were ceded to the United States, saving 150,000 acres thereof, which were reserved for a future home for the tribe, and which were afterwards set off by proper metes and bounds. A part of this diminished reservation was, under the provisions of a later treaty with the same Indians, dated June 28, 1862, allotted to individual members of the tribe, and the remainder sold to the Atchison and Pike's Peak Railroad Company for the benefit of the tribe. The question being whether the State of Kansas is entitled, under the school-land grant in section 3 of the act of January 29, 1861, chap. 20, to indemnity for sections 16 and 36 within the diminished reservation thus disposed of, or to such sections in place: *Held* (1) that the title of the Kickapoos to the lands within that reservation, when said act of 1861 was passed, was one of occupancy only (the ordinary Indian title), and the effect of the act was to grant to the State sections 16 and 36 in the reservation subject to that title; but this grant was also subject to certain rights reserved to the United States in the *proviso* to the first section of that act, by which the Government was authorized to make, and subsequently did make, other disposition of the lands by treaty; (2) that when such other disposition was made under the treaty of 1862, a case arose which is provided for in the said act of 1861, namely, of lands that have "otherwise been disposed of" by the United States, and which entitled the State to indemnity thereunder; (3) that, therefore, if the sixteenth and thirty-sixth sections within the diminished reservation of the Kickapoos are not now to be found in place, by reason of the disposition of them made as aforesaid under the treaty of 1862, the State of Kansas is entitled to indemnity therefor. 432.
21. By act of May 12, 1864, chap. 84, a grant of lands was made to the State of Iowa to aid in the "construction of a railroad from a point at or near the foot of Main street, South McGregor, in said State, in a westerly direction, by the most practicable route, on or near the forty-third parallel of north latitude, until it shall intersect the said road running from Sioux City to the Minnesota

LANDS, PUBLIC—Continued.

State line, in the county of O'Brien, in said State." Subsequently, in 1864, a map was filed in the General Land Office designating the general route of the road from McGregor to a point in O'Brien County, so as to form a junction with the line of the proposed road from Sioux City to the Minnesota State line. In 1869 a partial change in the location of the road was made by direction of the Commissioner of the General Land Office, and the location thus made, from the point where it departed from the location of 1864 on to the western terminus, became the recognized line of the road by the Interior Department west of that point, and the public lands along the same were accordingly withdrawn. The road, however, having since been constructed upon a line different from the line located in 1869, the question considered is, whether, assuming that the location of 1869 was the definite location of the line of the road, but that the road has been constructed upon a different line, the State is entitled to the benefit of the grant; and, if so, then whether, in adjusting the grant, the line of definite location is to be regarded, or the line upon which the road was actually constructed. *Held* that, in contemplation of the statute, the road was to be constructed upon the line of definite location; that the effect of such location, when made, is to give precision to the grant, and to define the limits within which the lands granted could be at once ascertained by the public surveys; and that whatever adjustment of the grant is made must therefore be made according to the line of definite location of the road. Yet *held*, further, that if the road has not been constructed on the line of its definite location—and it is for the Secretary of the Interior to determine whether or not the road has been constructed on that line—the State is not entitled to the benefit of the grant, although the line of the constructed road would answer the terms of the grant had it been the line of definite location. 457.

22. Whether deflections from the line of definite location, made in the actual construction of the road, have identified it with a different line, or whether in its construction there has been substantial conformity to the line of definite location, is a matter for the Interior Department to determine. But *advised* that where the deflections are in their character immaterial—*e. g.*, if made for the purpose of avoiding engineering obstacles which could not otherwise be avoided without enormous expense, or of remedying defects in the original location—such deflections would not destroy the identity of the constructed road with the line of definite location. *Ibid.*
23. The grant to Minnesota made by the act of March 3, 1857, chap. 99, to aid in the construction of certain railroads, viz, of "every alternate section of land, designated by odd numbers, for six sections in width on each side of each of said roads and branches," was a grant of *particular* sections of land lying within prescribed

LANDS, PUBLIC—Continued. *

- lateral limits to the road, to each of which the grant attached (on the definite location of the road) by distinct terms of description. And the indemnity provision in the same grant, giving other lands (to be selected within fifteen miles from the line of the road) in lieu of such of the granted lands as should appear, when the road was definitely located, to be sold by the United States or to be pre-empted, was equally precise. 503.
24. *Held*, accordingly, that the grant made by said act of 1857 was not one of quantity as distinguished from a grant of specified lands in place, and that a claim thereunder for an amount of land equal to one-half of six sections in width on each side of the road, or for six sections of land for every linear mile of road, including all sinuosities and deflections from a straight line, would be inadmissible. *Ibid.*
 25. The act of March 3, 1865, chap. 165, which declares (section 1) that "the quantity of lands granted to the State of Minnesota" by the said act of 1857 "shall be increased to ten sections per mile for each of said railroads and branches, subject to any and all limitations contained in said act and subsequent acts," &c., in effect only extended the lateral limits of the grant as made by the act of 1857 from "six" sections in width to "ten" sections in width on each side of the several roads and branches. The amendment thus introduced by the act of 1865 did not alter the character of the previous grant; this remained thereafter what it was before, a grant of lands in place as distinguished from a grant of quantity. *Ibid.*
 26. Under the provisions of said acts of 1857 and 1865, the State of Minnesota is entitled to indemnity for lands lying within the limits of the grant (i. e., within ten miles from the line of definite location of the road) which it shall have lost by reason of the fact that such lands were sold by the United States or were pre-empted, whether the sale took place or the right of the pre-emptor attached before or after the date of the grant, provided the indemnity lands can be found within the proper indemnity limits (viz, within twenty miles from the line of the road). *Ibid.*
 27. But those provisions do not entitle the State to indemnity for lands which were never included within its grant, such as lands reserved to the United States by any act of Congress, or in other manner by competent authority, and excepted out of the grant. The indemnity is limited strictly by the sections lost in place, i. e., sections which came within the terms of the grant, but which were previously, or have been subsequently, sold by the United States or pre-empted. It is not made in order that the State shall have necessarily a hundred sections of land for each ten miles in length of constructed road, but in order to make the grant good. *Ibid.*
 28. Accordingly, if there were reservations to the United States within the limits of the grant, or if the State were not entitled to one

LANDS, PUBLIC—Continued.

hundred sections of land within those limits for any ten-mile division of constructed road in consequence of the curvatures or sinuosities of the road in such division, no right would exist for a deficiency thus arising. 504.

29. The act of July 27, 1866, chap. 278, provided (in section 3) "that there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, &c., for the purpose of aiding in the construction of said railroad, &c., every alternate section of public land, not mineral, designated by odd numbers," to the amount of ten and twenty alternate sections per mile as therein set forth, "whenever, on the line thereof, the United States have full title, not reserved, sold, granted, &c., at the time the line of said road is designated by a plat thereof filed in" the General Land Office. Section 8 declared the grant to be "upon and subject to the following conditions, namely, that the said company shall (*inter alia*) complete not less than fifty miles per year after the second year (i. e., from the date of the act), and shall construct, equip, furnish, and complete the main line of the whole road by July 4, 1878"; and by section 9 the grant was declared to be "upon the further condition that if the said company make any breach of the conditions hereof, and allow the same to continue for upwards of one year, then, in such case, at any time hereafter, the United States may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road." Section 4 provided that on completion of twenty-five consecutive miles of any portion of the road the President should appoint three commissioners to examine the same, and upon their report, on oath, that the section of twenty-five miles has been completed as required by the act, patents for the granted lands coterminous therewith are to be issued. Prior to 1871 the company constructed its road from Springfield, Mo., to the western boundary of that State; and this portion of the road was examined in conformity to section 4 of said act, and accepted, and patents for the coterminous granted lands issued. A small portion of the road was also constructed in the Indian Territory. But during the period from the year 1871 down to August, 1880, no part of the road was constructed. A section of twenty-five miles of the road west from Albuquerque, N. Mex., having since been constructed, the company now makes application for the appointment of three commissioners to examine and report upon the same, under said section 4. *Held* (1) that the grant made by said act to the said company is a grant *in præsentis* (which acquired precision when the plat of the line of its road was filed as required by the statute); (2) that the conditions in section 8 of the act are conditions subsequent, and that the grant has not been forfeited by the failure of the company to perform the same, or any of them, no action to enforce a forfeiture by reason of such default having been taken by authority of Congress; (3)

LANDS, PUBLIC—Continued.

that the company has still a right to proceed with the construction of the road, and, until in some way authorized by Congress advantage is taken of the breach of the conditions, it is the duty of the Executive Department of the Government to give the company the benefit of the grant; (4) that the application of the company for the appointment of commissioners to examine the section of road constructed west of Albuquerque should be granted, and, if the road shall be found to be completed in all respects as required by said act, it should be accepted, and patents for lands coterminous therewith be issued. 572.

LEASE.

See PUBLIC BUILDINGS.

LEGAL TENDER.

See SUBSIDIARY SILVER COINS, 1, 2.

LICENSE.

See ENROLLMENT AND LICENSE OF VESSELS, 1; SANDY HOOK, LAND OF THE UNITED STATES AT, 2.

LIEN.

See CUSTOMS LAWS, 3, 4.

LIFE-SAVING SERVICE.

See WRECK.

LIGHT-HOUSE AND LIGHT-HOUSE BOARD.

See EASEMENT; NAVIGABLE WATERS, LAND UNDER, 1.

LIMITATIONS.

See STATE WAR CLAIMS, 1.

LOCK-BOXES FOR POST-OFFICES.

Opinion of January 18, 1879 (*ante*, p. 255), reconsidered, and in view of the fact that expenditures for providing and repairing lock-boxes in public buildings occupied for post-offices have hitherto been made and are still being made from an appropriation under the control of the Secretary of the Treasury, and other circumstances: *Advised* that no immediate change of this practice be made, it not being so clearly without warrant of law as to render an immediate change imperative. 265.

LONGEVITY.

See ARMY, 20.

LOSS OF DATE.

See NAVY, 11, 12, 13.

LOTTERIES.

See POSTAL LAWS, 1, 2.

LOUISVILLE AND PORTLAND CANAL.

1. The act of May 18, 1880, chap. 95, which abolished all tolls at the Louisville and Portland Canal after July 1, 1880, authorized the Secretary of War "to draw his warrant from time to time upon the Secretary of the Treasury to pay the actual expenses of operating and keeping said canal in repair." *Held* that, by fair implication from the provision quoted, the Secretary of the Treasury is thereby as fully authorized to pay the warrants drawn by the Secretary of War as if it had expressly declared that they should be paid out of any moneys in the Treasury not otherwise appropriated. 557.
2. That act compared with the provisions in the act of June 14, 1880, chap. 211, directing the application of the money collected theretofore as tolls on said canal, or which may thereafter "be so collected prior to the passage of an act to make said canal free to the public," &c., and the purpose of each enactment explained. *Ibid.*

MAIL CONTRACTS, SUBLETTING OR TRANSFER OF.

See POSTAL LAWS, 3, 4, 5, 10, 11.

MARSHAL.

See COMPENSATION, 9, 10, 11, 12; POSSE COMITATUS, 1, 2.

MEDICAL CORPS.

See ARMY, 4, 18, 21, 24, 25.

MILEAGE.

See ARMY, 14, 15.

MILITARY ACADEMY.

1. The professorship of the Spanish language in the Military Academy at West Point, being established by statute (section 1309 Rev. Stat.), cannot be abolished by an Executive order. 17.
2. In the third section of the act of June 11, 1878, chap. 181, making appropriations for the support of the Military Academy, the word "hereafter" has been changed from "thereafter" by a clerical error. All changes mentioned in such section are referred to the date, July 1, 1882. 49.

MILITARY PRISON, PRISONERS IN.

See COURT-MARTIAL, 7, 8.

MINNESOTA RAILROAD LAND GRANTS.

See LANDS, PUBLIC, 15, 16, 17, 23, 24, 25, 26, 27, 28.

MISSISSIPPI RIVER COMMISSION.

See ARMY, 14.

MISSOURI MILITIA.

1. The troops known as the "enrolled Missouri militia," though acting from time to time in co-operation with the Army of the

MISSOURI MILITIA—Continued.

United States in the suppression of the rebellion, constituted no part of it, they never having been mustered into the service of the United States. 147.

2. An order disbanding such troops (though entirely creditable to the troops thus disbanded) is not an honorable discharge within the meaning of section 2304 Rev. Stat. 148.
3. Persons who served with said enrolled militia are therefore not entitled to enter homesteads under the provisions of that section. To entitle them thereto further legislation is necessary. *Ibid.*

MISSOURI RIVER, FORT SCOTT AND GULF R. R. CO.

1. The mortgage to Nathaniel Thayer and others, trustees, executed by the Missouri River Fort Scott, and Gulf Railroad Company (formerly the Kansas and Neosho Valley Railroad Company), on the 1st of January, 1869, to secure payment of bonds of the company to the amount of \$5,000,000, is a lien upon the lands granted to the State of Kansas for the company by the act of July 25, 1866, chap. 241, so far as, and no farther than, those lands were patented to it at the date of the act of March 3, 1877, chap. 125. 49.
2. The trustees in the mortgage, however, having instituted proceedings in the United States circuit court for Kansas against the said company, praying for the appointment of a receiver and the foreclosure of the mortgage, the court made a decree appointing a receiver, and also a further decree, by consent of both parties to the suit, authorizing the receiver to execute and deliver to the United States a quitclaim deed for the lands conveyed by said company to the United States under the requirements of the act of March 3, 1877, chap. 125, which deed, by the terms of the decree, should release said lands from the mortgage: *Held* that the quitclaim deed, when executed and delivered by the receiver, will effect a valid discharge of the lien upon the said lands created by the mortgage. *Ibid.*
3. The act of July 25, 1866, chap. 241, sections 1 to 5, the act of July 12, 1876, chap. 179, section 13, and the act of March 3, 1877, chap. 125, considered; and *held* that upon the acceptance by the Missouri River, Fort Scott and Gulf Railroad Company (formerly the Kansas and Neosho Valley Railroad Company) of the terms and conditions of the said act of March 3, 1877, according to the provisions thereof, that act became binding upon the company from its date, and that the road of the company should be treated as a non-land-grant road from such date (March 3, 1877). 481.

MISTAKE, PAYMENT BY.

See CLAIMS, 7.

MORTGAGE.

See MISSOURI RIVER, FORT SCOTT AND GULF R. R. CO., 1, 2.

NATIONAL BOARD OF HEALTH.

1. The National Board of Health can properly pay, from funds under its control, for tents furnished by the War Department as a matter of urgent necessity to the camp which was established at Memphis, Tenn., to prevent the spread of yellow fever to other States. 379.
2. That Board has no power to aid in suppressing yellow fever, except so far as is required to prevent it from being imported into the United States, or from one State into another. *Ibid.*

NATIONAL CEMETERY.

The superintendent of a national cemetery, over which the State has ceded jurisdiction to the United States, and within the limits of which he resides, is exempt from the duty devolved by the State upon all male persons between certain ages to work on the public roads. Otherwise if the State has not ceded jurisdiction, or if the superintendent resides elsewhere within its jurisdiction. 468.

NATIONAL HOME FOR VOLUNTEER SOLDIERS.

See PENSION, 6, 7, 8.

NAUTICAL ALMANAC.

See DEPARTMENTAL PRINTING AND BINDING, 2.

NAVAL ACADEMY.

1. Opinion of August 7, 1877 (15 Opin., 637), in the cases of Ensign Qualtrough, Master Turner, and others of the Navy—involving the question of relative rank among graduates of the Naval Academy, as between members of the same class—reaffirmed. 296.
2. *Advised* that the construction given to the act of July 15, 1870, chap. 295, at the Naval Academy—viz, that midshipmen, although graduates, were nevertheless not entirely emancipated from probationary study, but that, after graduation, they were still (as theretofore) to be students at sea, and that while so students at sea a provisional relative rank was assigned them by the statute, but it was not intended by such legislation to abolish the old discipline by which a final graduating examination was to have effect upon the relative rank which they should have after emancipation—he not disturbed. *Ibid.*
3. On March 6, 1878, a Representative in Congress was informed by the Navy Department of a vacant cadetship in the Naval Academy, which was to be filled by an appointment from his district. He recommended a candidate for admission, who failed to pass the examination held in June, 1878; he thereupon recommended another candidate, who failed to pass the examination held in September, 1878. The times fixed by the Regulations of the Academy for the examination of candidates for admission are June 11 and September 22 of each year. *Held* that the next recommendation of a candidate for admission to fill the said vacancy should not be made until after March 5, 1879. 621.

NAVAL ACADEMY—Continued.

4. Section 1515 Rev. Stat. is to be read as if the dates fixed by the Regulations of the Academy for the examination of candidates for admission were inserted therein; and hence, by the existing law, the season for recommendations and nominations of cadet-midshipmen begins after the 5th of March and expires on the 22d of September in each year. *Ibid.*

NAVAL EXAMINING BOARD—REHEARING.

See NAVY, 1.

NAVAL RETIRING BOARD.

See NAVY, 4, 5.

NAVIGABLE WATERS, LAND UNDER.

1. It is not competent to the Light-House Board to erect a light-house on Great Beds, Raritan Bay (for the establishment of which provision is made by the act of June 20, 1878, chap. 359), until title to the sites, though located under navigable waters of the United States, has been obtained for the Government. 369.
2. The proprietorship of the soil under such waters, within the territorial limits of a State, belongs absolutely to the State, subject only to the rights surrendered by the constitution to the General Government. 370.
3. Where lands of that description are needed to enable the General Government to perform its proper functions (as, *e. g.*, to establish light-houses), it may appropriate them for that purpose. This it may do, not by virtue of any ownership in the soil, but by virtue of the right of eminent domain. *Ibid.*
4. That mode of acquiring lands (by the exercise of the right of eminent domain, which calls for a judicial proceeding) can be resorted to only in cases where provision is made therefor by statute. *Ibid.*

See IMPROVEMENT OF NAVIGABLE WATERS, 1, 2.

NAVIGATION.

The penalties imposed by State laws for piloting vessels without due license from the State have no application to persons employed as pilots on board of the public vessels of the United States, the latter vessels being within the exclusive jurisdiction of the United States. 647.

NAVY.

1. A naval officer having appeared before an examining board (organized and conducted under sections 1493 to 1505 Rev. Stat.), and the examination being temporarily suspended, was granted permission to go home and to be absent until notified by the board to appear. He failed to receive this notice until after the examination, which was resumed during his absence, had been concluded. The proceedings and findings of the board were

NAVY—Continued.

approved by the President, and his order in the case duly executed by the retirement of the officer (under section 1447 Rev. Stat.). But the vacancy created by such retirement remains unfilled, and no rights of any other person have intervened. *Held* that the action of the President can be revoked, and the officer allowed a rehearing. 20.

2. On February 4, 1863, Z. was appointed a chief engineer in the volunteer naval service. In June, 1868, he was transferred to the same grade in the Regular Navy, upon nomination by the President and confirmation by the Senate, as a chief engineer therein, his commission bearing date the 18th of that month. Subsequently he applied to the Navy Department for a new commission, giving him rank in the Regular Navy from February 4, 1863 (claiming to be entitled thereto under the provisions of section 3 of the act of March 2, 1867, chap. 174), and a new commission giving him rank from that date was transmitted to him on the 23d of January, 1877. *Held* that section 3 of the act of March 2, 1867, did not entitle Z., on his transfer to the Regular Navy, to hold a commission as of the date of his appointment in the volunteer naval service; that the commission transmitted to him January, 1877, was improvidently issued; and that his place on the Naval Register must be determined according to the rank given him by the commission which was issued upon his nomination to and confirmation by the Senate, namely, the commission dated June 18, 1868. 45.
3. The interpretation placed upon section 3 of the act of March 2, 1867, by Attorney-General Williams, in 14 Opin., 192, 358—viz., that it was designed to give the transferred officers the full benefit of their former sea-service, in so far as it might go to complete the period of such service required in their respective grades previous to nomination for promotion, and in so far as it ought properly to be taken into account in the matter of assignment to duty, and that it conferred no advantages beyond these—approved and adopted. *Ibid.*
4. Where a naval retiring board, convened to inquire into the nature and cause of the disability of an officer, has once finished its work, rendered a complete judgment in the case, and adjourned, a subsequent reconsideration of its judgment by the board, unless authorized or directed by proper authority, can have no legal effect. 104.
5. Accordingly, upon examination of the record of the proceedings before a naval retiring board, in the case of Paymaster Rodney, *held* that the paper attached to the record, called a reconsideration of the finding of the board, was without legal effect, and that that officer was properly retired, under the original finding of the board, on furlough pay. *Ibid.*
6. Section 1475 Rev. Stat. does not give to a pay-inspector in the Navy the grade of commander. It confers upon him the rank of

NAVY—Continued.

- commander *by relation* (only) to the rank of a line officer of that grade. 414.
7. By the use of the terms "relative rank," in that section, Congress intended to make the grades of the pay corps of the Navy equal to, but not identical with, the grades of the line with which they are by those terms associated. *Ibid.*
 8. As generally used in reference to the naval and military service, the word "title" signifies the name by which an office, or the holder of an office, is designated and distinguished, and by which the officer has a right to be addressed; "grade," one of the divisions or degrees in the particular branch of the service, according to which officers therein are arranged; and "rank," the position of officers of different grades, or of the same grade, in point of authority, precedence, or the like, of one over another. Sometimes "rank" is used as synonymous with "grade," and the title of an officer (e. g., admiral, vice-admiral) may denote both his grade and his rank. *Ibid.*
 9. The designation "pay-inspector" expresses both title and grade in the pay corps. 415.
 10. *Held*, accordingly, that a commission in the following form: "John Doe, a pay-inspector from the — day of —, A. D. 187—, with the relative rank of commander," gives the appropriate title and grade of the officer named therein, and fully satisfies the requirement of section 1480 Rev. Stat. in that regard. *Ibid.*
 11. The words in section 1505 Rev. Stat., namely, "shall be suspended from promotion for one year, with corresponding loss of date," do not mean that the loss of date is to be *contemporaneous* with the term of suspension, but only that it shall agree therewith in point of duration. 587.
 12. Accordingly, where A., a lieutenant in the Navy, being the senior officer of his grade, became entitled to examination for promotion to fill a vacancy in the next higher grade (lieutenant-commander), which occurred January 22, 1880, and afterwards, upon examination, failed to pass, and the findings of the examining boards were approved February 6, 1880, by the President, who directed that he "be suspended from promotion for one year, with corresponding loss of date": *Held* that the loss of date of A. is one year, to be reckoned from the occurrence of the vacancy, January 22, 1880, the date from which he would have taken rank as lieutenant-commander had he been found qualified for promotion, and that his year of suspension is to be reckoned from the approval of the President of the findings of the examining boards, February 6, 1880. *Ibid.*
 13. In the above case, as A., by reason of his suspension, is ineligible for promotion during the whole of the year commencing February 6, 1880, no vacancy should be kept open for him until February 6, 1881. Such vacancies as happen to exist during that period, the officers who are then eligible for promotion are en-

NAVY—Continued.

titled to fill. But as his loss of date is only to be one year from January 22, 1880, if, on his second examination, he shall be found qualified to fill a vacancy in the next higher grade which occurred after the period of his suspension, he will be entitled, upon promotion thereto, to take rank in such grade as of the date of January 22, 1881. He will not, however, be entitled to the pay of the higher grade from the ranking date in his commission. *Ibid.*

See ENGINEERS, CIVIL, IN THE NAVAL SERVICE.

NAVY REGULATIONS.

1. The regulations of the Navy concerning payments to administrators of balances due deceased seamen and marines, payments of arrearages claimed under wills, the wills of persons in actual service and the attestation of the same, &c., are not applicable to or binding upon the accounting officers of the Treasury Department in the settlement of naval accounts. They extend to and govern only those persons who are in the naval service. 494.
2. Paragraphs 9, 12, and 13 of the Navy Regulations of 1876 (page 114) commented on and construed. *Ibid.*

NORTHERN PACIFIC RAILROAD COMPANY.

See TRANSPORTATION.

OFFENSE AGAINST FOREIGN GOVERNMENT.

1. An American vessel, having been embargoed in a port of Brazil by competent authority, was unlawfully taken out of the port and out of Brazilian waters by her master, without payment of the required charges. The Brazilian Government requests that measures be taken by this Government against the master to redress the injury to the fiscal interests of Brazil resulting from his act. *Advised* that the act charged against the master was not a violation of any statute of the United States, and that, in the absence of a statutory provision applicable to the case, no prosecution therefor could be maintained in the courts of the United States. 281.
2. Where the master of an American vessel, which was under detention by the customs authorities at a port in Jamaica, escaped with his vessel in violation of the British revenue laws: *Advised* that there is no statute of the United States under which the master is liable to prosecution in the courts of this country for the act alleged. 283.

OFFICERS AND SOLDIERS, PAY OF, AS WITNESSES.

See COMPENSATION, 8, 9.

OFFICIAL ENVELOPE.

1. Section 29 of the act of March 3, 1879, chap. 180, extending the provisions of sections 5 and 6 of the act of March 3, 1877, chap. 103, relating to official envelopes, does not impose upon the Execu-

OFFICIAL ENVELOPE—Continued.

- tive Departments at Washington the duty of furnishing such envelopes to the various subordinate officers throughout the United States who are under their supervision, but whose offices are not offices in those Departments, excepting, of course, cases where that duty is required by other statutory provisions than those above mentioned. 455.
2. Where the envelopes are not furnished by the Departments, they may be prepared for their own use by the officers contemplated in section 29 of said act of March 3, 1879. The statute does not require that the penalty, &c., on such envelopes should be printed rather than written. *Ibid.*
 3. Where a member of Congress has addressed an inquiry about official business to a Department or any bureau thereof, the reply may properly be addressed to the person concerned in a penalty-envelope and sent unsealed to the member (that he may take cognizance of its contents), to be by him forwarded to its destination. But in such case the use of the envelope must be strictly limited to the Department or bureau and the applicant. 501.

OMAHA, SITE FOR PUBLIC BUILDINGS AT.

1. Under the provision in the act of June 18, 1878, chap. 263, authorizing the Secretary of War, "in his discretion, to expend the sum of \$60,000, or so much thereof as may be necessary, in the construction of suitable buildings for store-houses and offices at Omaha, Nebraska," he would not be warranted in accepting a gift of land on which to erect such buildings; it appearing that the Government already owns land at Omaha which is available for the purpose, and it being fairly inferable that Congress intended to provide for the construction of the buildings thereon. 119.
2. Where land, at the city of Omaha, Nebr., was *donated* to the United States for the purpose of a site for a certain public building, for the construction of which an appropriation was made by the act of June 23, 1879, chap. 35: *Held* that the consent of the legislature of the State to the grant is required by force of section 355 Rev. Stat. before any part of the appropriation can be lawfully expended in the erection of the building. (See Joint Resolution No. 9, of February 5, 1880.) 414.

PACIFIC RAILWAYS.

See COMPENSATION, 13, 14.

PARDON.

1. M., having been convicted in a Federal court of an offense against the United States, was, in April, 1876, sentenced by the court to pay a fine of \$1,000. He paid the fine, and subsequently applied for a pardon, which was granted January 27, 1877, at which time the money received in payment of the fine had not been covered

PARDON—Continued.

- into the Treasury. The pardon was a full and unconditional one, but contained no clause of restitution: *Held* that if the money paid in satisfaction of the fine has not yet been covered into the Treasury, but still remains under the control of the Executive, the same should be restored to M. 1.
2. Where the pardon is full and unqualified, express words of restitution in the pardon are not needed to entitle its recipient to restitution. The right thereto results by the mere *effect* of such a pardon. *Ibid*.
 3. The organic act of Dakota Territory (see section 2, act of March 2, 1861, chap. 239; also section 1841 Rev. Stat.) confers upon the governor the power to pardon offenses against the laws of the Territory without any restriction or limitation whatever; and this power the Territorial legislature cannot limit or restrict, nor can its exercise by the governor be in any respect controlled thereby. 27.
 4. Certain provisions in the Revised Code of Dakota, 1877, namely, sections 544, 545, 547, 548, 549, and 551, considered in connection with the pardoning power of the governor, some of which (sections 544, 545, 547, and 551) are deemed objectionable as being in conflict with the organic act, while others (sections 547, 548) are regarded as unobjectionable. *Ibid*.

PATENT.

1. Where a patent was issued to B., J., and L. jointly, in conformity to their application as joint inventors, when in fact the device patented was not the joint invention of all of the applicants, but the sole invention of B., the others (J. and L.) being his assignees only: *Held* that it is not within the power of the Interior Department to correct the patent thus issued so as to show that B. was the inventor of the device and that J. and L. are the assignees thereof. 116.
2. The patent issued upon such application being void, the Department cannot, by means of alterations or corrections, impart validity thereto. 117.
3. The parties interested can file a new application in a case of that sort, which, if seasonably done, may be made the basis for the issue of a new patent; but the latter will not retroact by way of confirmation of the patent originally issued. *Ibid*.
4. Officers of the United States, when they use articles manufactured in violation of the rights of patentees, are liable to suit therefor. Hence where articles are advertised for by the United States, and it is claimed by an unsuccessful bidder or other party that the successful bidder, in order to furnish the articles, must make them in violation of his patent, it is proper that the successful bidder should be required to furnish a satisfactory bond of indemnity for the security of the officer against any suit for infringement of patent by the use of the articles. 133.

PATENT—Continued.

5. Where an application for a reissue of a patent in two or more divisions is made, whilst the original patent is in existence, the Commissioner of Patents has power to issue a patent for one or more of the divisions of the reissue application, and subsequently to issue a patent for the remaining divisions, if it be deemed that otherwise the applicant is entitled thereto. Until such application is ended in all its divisions, the vitality of the original patent continues, so far as required to support that portion of the application which remains undecided. 560.

PAYMENT.

By act of March 3, 1879, chap. 182, an appropriation of a certain amount was made "to pay George H. Giddings, late contractor, for one month's extra pay on discontinuance of a portion of route numbered 8,076, Texas, which went into effect July 1, 1861, in accordance with the opinion of the Attorney-General." Subsequently one D., claiming a right to a portion of the fund thus appropriated, filed a bill in the supreme court of the District of Columbia against the said Giddings, upon which an order was issued by the court forbidding him to meddle with the fund, and appointing a receiver to obtain and hold the same subject to the order of the court. A warrant having been issued for the payment of the amount to Giddings pursuant to the terms of the statute, the receiver made application to the Postmaster-General for the delivery of the warrant to him. *Advised* that the payment cannot properly be made to any other than the person designated by Congress to receive it; that after such action by Congress, the Executive Departments ought not to submit to the courts, upon any ground of comity, the question as to who should receive the fund; and that the application should be denied. 366.

PENALTY ENVELOPE.

See OFFICIAL ENVELOPE.

PENNSYLVANIA, WAR-CLAIM OF.

See CLAIMS, 22.

PENSION.

1. The provision in the first section of the act of March 9, 1878, chap. 28, authorizing and directing the Secretary of the Interior "to place on the pension-rolls the names of the surviving officers and enlisted and drafted men * * * of the military and naval service of the United States, who served for fourteen days in the war with Great Britain," does not include service performed in the land or naval forces after the ratification of the treaty of peace between the United States and Great Britain, which took place February 17, 1815. 134.

PENSION—Continued.

2. That act is to be construed in connection with the act of February 14, 1871, chap. 50, wherein the "war with Great Britain" referred to above is expressly declared to have been terminated by the treaty of peace. *Ibid.*
3. *Held*, accordingly, that a soldier who served fourteen days after the date of the ratification of the treaty of peace is not entitled to the benefit of the act of March 9, 1878. *Ibid.*
4. In March, 1865, a soldier received in battle a gunshot wound in the arm, resulting in the partial disability thereof. On October 3, 1867, an examining surgeon found that the injury to the arm occasioned the loss of fourteen-eightieths of its original vigor, and therefore certified that the soldier was unable to do any manual labor. *Held* that the disability in this case was not "specific" within the meaning of section 4698½ Rev. Stat., and that no increase of pension was allowable to the soldier in respect of such disability, commencing prior to the date of the examining surgeon's certificate. 330.
5. The terms "specific disabilities," as used in that section, signify those disabilities which are *specified* in the pension laws—such as the loss of a hand, foot, or eye. Injuries requiring medical examination to ascertain and declare their nature and extent, and as to the effect of which there is room for difference of opinion, are not comprehended thereby. 331.
6. The assignment of his pension certificate by an inmate of the National Home for Volunteer Soldiers, under section 4832 Rev. Stat., does not give to the managers of that institution a right to collect or receive the pension therein mentioned for any period of time other than that during which he remains an inmate of the Home or receives its benefits. 374.
7. The Home is not authorized to collect or receive arrearages of pensions under the act of January 25, 1879, chap. 23, either on assignment or otherwise. *Ibid.*
8. Payment of arrears of pension to the Home for prudential or other reasons, except when made in accordance with law, will not relieve the Government of its obligation to the pensioner. Assignments not warranted by special enactment are forbidden by section 4745 Rev. Stat. *Ibid.*
9. The act of June 16, 1880, chap. 236, which provides for an increase of pension for certain pensioners "now receiving a pension of \$50 per month" under the act of June 18, 1874, chap. 299, being in terms limited to those who *at the time of its enactment* were receiving a pension of \$50 a month under the act of 1874, its benefits cannot be extended to those who may *thereafter* become entitled to receive a pension of the same amount under the act of 1874. 594.
10. The distinction made by statute between colored and other soldiers in pension cases, &c., in regard to proof of marriage (sections 2037 and 4705 Rev. Stat.), extends only to the marriage of the

PENSION—Continued.

soldier, and does not affect that of his parents or other relatives. 630.

11. An officer in the military service, during the rebellion, was discharged March 22, 1864, and died February 26, 1878, of disease contracted in the service. He was not a pensioner, nor had he ever applied for a pension. His widow, having obtained a pension running from the date of his death, made application under the acts of January 25, 1879, chap. 23, and March 3, 1879, chap. 187 (passed since her pension was obtained), for arrears of pension from the date of his discharge. *Held* that the application is not allowable under those acts. 639.

PILOT.

See NAVIGATION.

PORTAGE CANAL.

See FOX AND WISCONSIN RIVERS IMPROVEMENT.

POSSE COMITATUS.

1. Under section 27 of the act of September 24, 1789, chap. 20, United States marshals derived an implied authority to summon the military forces of the United States as a *posse comitatus* to aid them in the execution of process, the exercise of which authority was sanctioned by long practice. But no express authority thus to summon the military forces is given by any law; and section 15 of the act of June 18, 1878, chap. 263, prohibits the employment of any part of the Army as a *posse comitatus*, except where such employment is "expressly authorized by the Constitution or by act of Congress." 162.
2. *Held*, accordingly, in a case where an organized, armed, and fortified resistance to the execution of the law existed, that the marshal cannot be aided by the military forces of the United States as a *posse comitatus*. *Ibid*.
3. The military forces may, however, be used in such case by direction of the President, under the provisions of sections 5298 and 5300 Rev. Stat., should he deem proper to take certain preliminary steps therein provided and if resistance to the law shall thereafter continue. *Ibid*.

POSTAL LAWS.

1. The Postmaster-General is not authorized, under section 3894 Rev. Stat., to direct the postmaster at New Orleans to withhold from the mails letters *suspected* to contain advertisements of lotteries. 5.
2. Section 3895 Rev. Stat. does not constitute a postmaster a seizing or detaining officer of suspected letters. It confers no power to seize or to detain, but merely directs the disposition to be made of letters "seized or detained for violation of law" under other statutory provisions. *Ibid*.

POSTAL LAWS—Continued.

3. Section 2 of the act of May 17, 1878, chap. 107, which forbids any subletting or transfer of a mail contract without the written consent of the Postmaster-General, and declares that any sublease or transfer without such consent shall be deemed a violation of the contract and authorize new advertising for the same, and, furthermore, that the contractor and his sureties shall be liable for any damages thereby resulting to the United States, does not impose any greater liability on the sureties upon contracts already existing than the one which they originally incurred. 61.
4. Nor is any greater liability than that originally incurred imposed on such sureties by section 3 of the same act, which provides for the case where there has been a lawful subletting of a mail contract, and protects the subcontractor. But the provisions of this section are not to be so construed as to diminish the rights which the sureties have upon the amount that had become due the original contractor before such subletting. *Ibid.*
5. The requirements of sections 2 and 3 of said act are applicable to all mail contracts, including as well those already existing or awarded as those which may be entered into in future. *Ibid.*
6. *Advised* that the Postmaster-General, in adjusting the rates of compensation to be allowed the Union Pacific Railroad Company for carrying the mails, apply the same rules that Congress has made applicable to railroad companies in general (see acts of March 3, 1873, chap. 231, July 12, 1876, chap. 179, and June 17, 1878, chap. 259), until the Supreme Court shall have made an authoritative settlement of the questions raised by that company—concurring in opinion of February 16, 1877 (15 Opin., 610). 196.
7. The *Missionary Herald*, a paper issued less often than once a week—the publication office whereof is in Boston, Mass., but its subscription list as to Boston and the adjacent towns is owned by a newsdealer in Brookline, Mass., from whence all copies intended for subscribers in Boston are mailed by him—is chargeable, under section 5 of the act of June 23, 1874, chap. 456, only with pound rates on the copies so mailed. 232.
8. But that section and section 3872 Rev. Stat. are to be construed together; and accordingly where newspapers are deposited in an office within the same post-office district within which the subscribers live, they are chargeable at the rate of one cent a copy. 233.
9. An oral demand by a railroad company, through its authorized agent, for a readjustment of its account under the act of March 3, 1873, chap. 231, is sufficient in order to rebut the presumption of acquiescence in an adverse ruling of the Post-Office Department, unless there is an established practice in the Department, having the force of law, by which such demands are required to be made in writing. 264.
10. Where a mail contractor, after having correspondence with another person preliminary to subletting his contract to him, which con-

POSTAL LAWS—Continued.

templated an agreement to be thereafter made between them, orally agreed with such person as to the details of the service and the amount the latter was to receive for the performance thereof: *Held* that this did not constitute such a subcontract as is provided for by section 3 of the act of May 17, 1878, chap. 107. 280.

11. An oral contract is not sufficient to entitle the subcontractor to the benefit of that section. *Ibid.*
12. The words "regular publications designed primarily for advertising purposes," in the *proviso* of section 14 of the act of March 3, 1879, chap. 180, mean publications chiefly or principally designed for advertising purposes. Whether or not the chief or principal design of any publication is for such purposes, is a question of fact which must be determined by the Postmaster-General in each individual case from the evidence he may be able to obtain. 303.
13. Where it appeared that a mail contractor was of unsound mind when he executed contracts for carrying the mail over certain routes, and also when he signed the bond of another person who was nominally contractor for carrying the mail over another route, but the real party in interest was the contractor first mentioned; and, by the failure to carry out each of the contracts, damages accrued to the United States: *Held* that, in order to the exercise of the discretionary power conferred by section 409 Rev. Stat. upon the Postmaster-General to compromise, release, or discharge claims in behalf of the Government arising under the postal laws, the "fact" to be ascertained in the case is not the mental condition of the mail contractor, but whether the interests of the Post-Office Department require the exercise of such power. 484.

POSTMASTER.

See TENURE OF OFFICE.

POSTMASTER-GENERAL.

The Postmaster-General has authority, under section 2 of the act of July 24, 1866, chap. 230, to fix the rates at which telegraphic communications between the several Departments of the Government and their officers and agents shall be carried over the line controlled by the Atlantic and Pacific Telegraph Company. 353.

See POSTAL LAWS, 1, 6, 12, 13.

POST-TRADER.

1. A post-trader, located upon a Government reservation at a military post, within the boundaries of a Territory, cannot, because of the location of his business, claim exemption from the payment of a license tax imposed by the Territorial authorities, where his business extends to other than military persons. But where his business is confined to persons in the military service, it is not com-

POST-TRADER—Continued.

petent for the Territorial authorities to subject him to the payment of such tax. 657.

2. Post-traders at military posts, appointed under section 3 of the act of July 24, 1876, chap. 226, are by that section made subject to the regulations of the Army applicable to the occupation or business carried on by them, in like manner, and to the same extent, that sutlers formerly were with respect to the same business or occupation. *Held*, accordingly, that a tax of five cents for each soldier at the post, imposed by the council of administration upon the post-trader at Fort Dodge, Kansas, is in accordance with law. 658.

See INDIANS AND INDIAN LANDS, 3, 4.

POWER OF ATTORNEY.

See CLAIMS, 17, 18.

PRESIDENT.

1. The President has no authority, by virtue of section 2132 Rev. Stat., to prohibit the introduction of molasses into the Territory of Alaska (the article being used there for manufacturing distilled spirits for sale among the natives) when in his judgment the public interest seems to require that he should do so. In this matter that Territory cannot be considered as a country belonging to an Indian tribe. 141.
2. In the absence of an act of Congress authorizing it, the President has no authority to appoint a new board of commissioners to hear and decide all matters between the United States and the Eastern Band of Cherokee Indians, and also all differences between them and the Cherokee Nation. 225.
3. The question considered in opinion of December 3, 1878 (*ante*, p. 225), relative to the authority of the President to appoint a new board of commissioners under the seventeenth article of the treaty of 1835-'36 with the Cherokee Indians, re-examined, and the same conclusion reached as is indicated in that opinion. This conclusion is here based solely on the ground that by the act of June 27, 1846, chap. 34, which revived the commission and prohibited its continuance beyond one year, the intent is manifest that it should not again be revived or renewed, and that the power of Congress to put an end to the operation of said treaty provision cannot be questioned. 300.

See APPEAL, 1; APPOINTMENT, 2, 3, 4, 5, 6, 7, 8, 9, 10; ARMY, 9; CLAIMS, 8, 19; COURT-MARTIAL, 9; CREEK ORPHAN FUND, 5; INDIANS AND INDIAN LANDS, 1, 2; LANDS, PUBLIC, 8; POSSE COMITATUS, 3.

PRINTING AND BINDING.

See DEPARTMENTAL PRINTING AND BINDING.

PROPERTY LOST IN THE MILITARY SERVICE.

A vessel was chartered by the Quartermaster's Department at New York October 17, 1861, for a voyage of fifteen days, at a certain sum for the voyage, and a certain per diem for detention of the vessel beyond that period. The owner covenanted to keep the vessel seaworthy, and to victual, man, coal, and furnish her for the voyage; but the charter was silent with respect to the risks of the voyage. The vessel was to be laden with such cargo as might be desired by the Government officer, and as soon as her cargo was on board she was to proceed direct to Old Point Comfort, and be placed under the orders of the quartermaster there as to her future destination, and on arrival at her final destination she was to deliver her cargo and then return to New York. The vessel having arrived with a cargo at Old Point Comfort, and reported to the quartermaster at that port, by orders from the Quartermaster's Department joined the transport division of the military and naval expedition there organizing against Port Royal, S. C. The expedition put to sea October 29, 1861, and on November 3, 1861, the vessel was lost in a storm without fault or negligence on the part of her owner. The vessel was, while with the expedition, under the absolute control of the officers of the expedition as respects her course and rate of speed. *Held* (1) that the vessel was, by her charter, in the military service of the United States within the meaning of section 3483 Rev. Stat.; (2) that the owner not having expressly agreed to incur the risks of the voyage, the case does not fall within the exception contained in that section. 242.

PROTESTS AND APPEALS.

See CUSTOMS LAWS, 8, 17.

PUBLIC BUILDINGS.

1. The supervisors of Ontario County, New York, by authority of an act of the legislature of that State dated April 12, 1859, demised to the United States by a perpetual lease a certain part of the county court-house in the city of Canandaigua, some of the rooms within which part are used by the Post-Office Department for a post-office. *Held* that the law applicable to property of that description owned by the United States applies to the property perpetually leased as aforesaid. *Semble*, however, that an expenditure for lock-boxes for the post-office therein is one that appertains to the Post-Office Department and is properly chargeable to its appropriation. 255.
2. The Secretaries of State, War, and Navy have no authority to modify the approval given by them under section 2 of the act of March 3, 1871, chap. 113, of the plans of the building now being erected for the use of those Departments. 651.

PURCHASE.

See LAND, ACQUISITION OF, 1, 2.

QUARTERS, COMMUTATION FOR.

1. Where an officer of the Army, to whom leave of absence "without deduction of pay or allowance" has been granted under the act of July 29, 1876, chap. 239, is at the time he takes his leave entitled to an allowance of commutation for quarters under section 9 of the act of June 18, 1878, chap. 263, such allowance is, by force of the former act, continued to him whilst he is absent on leave for a period not exceeding that for which the leave was granted thereunder. Opinion of January 16, 1879, explained. (See *infra*, par. 3.) 577.
2. A military post or station where there are public quarters for officers, but such quarters are insufficient for the accommodation of all the officers there, is, in regard to those officers who are necessarily excluded from the public quarters, a place where there are "no public quarters" within the meaning of the *proviso* in section 9 of said act, and commutation for quarters may be allowed to the officers thus excluded. 611.
3. The act of July 29, 1876, chap. 239, taken in connection with section 24 of the act of July 15, 1870, chap. 294, continued to Army officers on leave of absence (during the period for which such leave may be granted to them thereunder "without deduction of pay or allowance") *quarters in kind*, but it did not authorize an allowance of commutation therefor. 619.
4. Where commutation for quarters is allowable to Army officers under section 9 of the act of June 18, 1878, chap. 263, it may include commutation for quarters for their servants, agreeably to the existing Army Regulations. *Ibid.*

RAILROAD LAND GRANTS.

See LANDS, PUBLIC, 4, 5, 6, 7, 9, 15, 16, 17, 21, 22, 23, 24, 25, 26, 27, 28.

RANK, GRADE, AND TITLE.

See NAVY, 8.

RECEIVER.

See PAYMENT.

REFUND OF DUTIES.

See CLAIMS, 3; CUSTOMS LAWS, 1, 8, 9; INTERNAL REVENUE, 17.

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See ARMY, 3; TREATY OF WASHINGTON, 1, 2.

REINSTATEMENT OF OFFICER.

See ARMY, 22; REVENUE-MARINE SERVICE, 1.

RELATIVE RANK.

See ARMY, 4, 13, 18; NAVAL ACADEMY, 1, 2; NAVY, 6, 7.

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RESERVATION.

See LANDS, PUBLIC, 8.

RESTITUTION OF FINE.

See PARDON, 1, 2.

RETIRED OFFICERS OF THE ARMY.

See ARMY, 2, 5.

RETIRED OFFICERS OF THE NAVY.

See COMPENSATION, 2.

REVENUE-MARINE SERVICE.

1. D., a third lieutenant in the Revenue-Marine Service, was suspended in October, 1878, by the President, who, during the ensuing session of the Senate, submitted his name thereto for its consent to his removal. The session of the Senate ended without any action by that body upon the removal. *Held* (1) that officers of the Revenue Marine are in the civil service of the Government as contradistinguished from the naval and military service (reaffirming opinion of November 13, 1877, 15 Opin., 396), and their suspension and removal are governed by the law applicable to civil officers; (2) that upon the adjournment of the Senate, D., by virtue of section 1768 Rev. Stat., became reinstated as an officer of the Revenue Marine. 288.
2. Upon the facts presented, the cadet in the Revenue-Marine Service who was appointed after the suspension of D., under the act of July 31, 1876, chap. 246, is not affected by D.'s reinstatement; there having been at the time of the appointment an actual vacancy in the service which the Secretary of the Treasury was authorized thus to fill. *Ibid.*

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ROAD.

See TERRITORIES, 1, 2, 3.

SALE OF ARMS.

See SECRETARY OF WAR, 6.

SANDY HOOK, LAND OF THE UNITED STATES AT.

1. Title of the United States to certain land held thereby at Sandy Hook reviewed; said land embracing the entire tract bounded southwardly by a line running east from the mouth of Young's Creek at low-water to the sea, and on every other side by the sea. 205.
2. The permission given by the President to the Long Branch and Sea-Shore Railroad Company in 1864, and that given to the same company with the approval of the Secretary of War in 1869, to occupy and use certain parts of said land for railroad purposes, conferred upon the company no interest whatever in the land itself. They constitute nothing more than a license, which is revokable at any time by the President or the duly authorized agents of the War Department; and upon the revocation thereof all the privileges derived thereunder by the company would terminate. *Ibid.*
3. So, by the terms of the agreement made March 31, 1864, with the New York and Sandy Hook Telegraph Company, it may be put an end to at any time at the pleasure of the Government, whereupon all rights and privileges derived by that company thereunder would immediately cease. *Ibid.*
4. There are no existing legal rights to said land in conflict or incompatible with the exclusive right and title of the United States. 206.

SAVANNAH RIVER IMPROVEMENT.

On examination of the provisions of the act of the Georgia legislature approved October 8, 1879, and upon considerations stated in the opinion: *Held* that payment of the \$1,000 awarded under that act to the owner of the point on Fig Island, which is contemplated to be removed by the United States in the work of improving the Savannah River, cannot be paid out of the amount appropriated for the continuance of that work; and *advised* that special legislation by Congress, providing for the payment, should not be had until the express assent of the State of Georgia to the acquisition and removal of the land by the United States is obtained. 540.

SCHOOL LANDS.

See LANDS, PUBLIC, 1, 2, 3, 18, 19, 20.

SEAMEN, DISCHARGE OF, IN FOREIGN PORTS.

See CONSUL, 1.

SECRETARY OF THE INTERIOR.

See CREEK ORPHAN FUND, 4, 6; LANDS, PUBLIC, 17, 21, 22; PATENT, 1, 2.

SECRETARY OF THE NAVY.

The Secretary of the Navy has no authority to grant to the city of Chelsea, Mass., a right to construct and maintain a sewer upon

SECRETARY OF THE NAVY—Continued.

the grounds of the United States naval hospital at that place.
To authorize the grant of such right an act of Congress is necessary. 152.

See COURT-MARTIAL, 18; PUBLIC BUILDINGS, 2.

SECRETARY OF STATE.

See PUBLIC BUILDINGS, 2.

SECRETARY OF THE TREASURY.

1. The Secretary of the Treasury has authority, under section 5153 Rev. Stat., to receive from national banking associations designated as depositaries of public money Treasury notes of the United States as security for the safe-keeping and prompt payment of the public money deposited with them and for the faithful performance of their duties as financial agents of the Government. 96.
2. The Secretary of the Treasury is not authorized by the provisions of the act of June 19, 1878, chap. 318, and of section 3012 Rev. Stat., to pay interest on the amounts exacted as tonnage tax, in contravention of treaty provisions, from steamers of the Norse American Line and of the North German Lloyd's Line. 103.

See ACCOUNTS AND ACCOUNTING OFFICERS, 1, 2; CLAIMS, 8, 19, 20; CLAIMS OF THE UNITED STATES; CONSUL, 2; CUSTOMS LAWS, 1, 4; LOUISVILLE AND PORTLAND CANAL, 1.

SECRETARY OF WAR.

1. The Secretary of War is authorized, under section 3 of the act of June 19, 1878, chap. 313 (the requirements of the statute being complied with), to draw his warrant in favor of James B. Eads to pay for materials furnished, labor done, and expenditures incurred during the month, without regard to other parties claiming to be his assignees. 153.
2. The Secretary of War has authority under the provision in the act of March 3, 1879, chap. 181, making an appropriation for an ice harbor at the mouth of the Muskingum, in the State of Ohio, to accept the grant made by the legislature of that State of the right to take possession of the dam belonging to the State, without further legislation by Congress. So, also, a grant from the city of Marietta of the use of the adjacent land owned by the city. 387.
3. The estate which the United States would hold in the dam, by virtue of the grant of the State, would be in the nature of an easement; yet it would be sufficient for the purpose contemplated by the provision aforesaid. *Ibid.*
4. The Secretary of War has not authority, under the provisions of the acts of March 3, 1879, chap. 181, and June 10, 1879, chap. 15, relating to the improvement of the Kentucky River, to enter upon the locks and dams belonging to the State of Kentucky for the purpose of putting them in repair until the State shall have

SECRETARY OF WAR—Continued.

ceded title to and jurisdiction over them so as to vest these in the United States, or until, after proper proceedings for condemnation had, the title shall be acquired by, and the jurisdiction shall, by act of the State, be transferred to, the United States. 405.

5. The Secretary of War (in execution of the act of March 3, 1877, chap. 119, which authorized him "to open and readjust the settlement made by the United States Government with the Western and Atlantic Railroad of Georgia") made an award, upon which a settlement was effected with the State of Georgia. Subsequently it was claimed that an important item of credit, which should have been allowed the State in the settlement, had been ignored, and application was made in behalf of the State for a revision of the award and settlement. The Secretary declined to reopen the award and settlement for the purpose of revising the same in connection with such claim; but he decided to revise the award for the purpose of making an additional allowance of a certain sum found to be due after correcting an accountant's error against the United States, and also a mistake against the State in the computation of interest. A renewed application for revision of the award and settlement was afterwards made by the governor of Georgia, but, without taking any action thereon, the Secretary resigned and went out of office. *Held* that the succeeding Secretary of War has not power to reopen the award and settlement made by his predecessor in office, with a view to the rectification thereof, in any respect other than that which had already been directed by his predecessor, the act having been fully executed by the latter. 452.

6. The Secretary of War has no power to sell to a State serviceable arms belonging to the United States. These and other munitions of war are held by him for the public purposes of the Government, without any authority to dispose of them by sale. 477.

See ARMY, 11; CLAIMS, 22; FORT PORTER MILITARY RESERVATION; PUBLIC BUILDINGS, 2; WEST POINT, RIGHT OF WAY OVER GOVERNMENT LAND AT, 2, 4.

SENATE CONTINGENT FUND.

See APPROPRIATIONS, 3.

SENTENCE, CONFIRMATION AND EXECUTION OF.

See COURT-MARTIAL, 9, 10, 11, 12, 13, 16.

SETTLEMENT, REOPENING OF.

See SECRETARY OF WAR, 5; CLAIMS, 22.

SINKING FUND.

See DISTRICT OF COLUMBIA, 3.

SOLDIERS AND SAILORS' ORPHANS' HOME.

See CLAIMS OF THE UNITED STATES.

SOLDIERS' HOME.

See THREE MONTHS' EXTRA PAY, 2, 3.

SOLICITOR OF THE TREASURY.

1. The Solicitor of the Treasury, by virtue of sections 3749 and 3750 Rev. Stat., has charge of, and, with the approval of the Secretary of the Treasury, power to rent or sell lands acquired in satisfaction of judgments on bonds of internal-revenue collectors. 144.
2. In making abatements, under section 4 of the act of June 14, 1878, chap. 192, of the purchase money due from purchasers of lots of land at Harper's Ferry sold by the Government in November, 1869, the Solicitor of the Treasury is not bound to adopt the present market value of the lots as a standard and abate the original purchase price down to that value. Yet he has power so to do; or, if he shall deem a fixed rate of deduction (as one-fourth or one-third of the purchase money) proper, he may make the abatements accordingly. 382.

See COMPROMISE, 1, 3, 5, 6; LANDS ACQUIRED IN SATISFACTION OF JUDGMENTS, 4.

SOUTHERN CLAIMS COMMISSION.

See CLAIMS, 5.

SOUTHERN PACIFIC RAILROAD.

See LANDS, PUBLIC, 4, 5, 6, 7.

SOUTH PASS OF THE MISSISSIPPI, IMPROVEMENT OF.

1. It was intended by section 2 of the act of June 19, 1878, chap. 313, to make provision for remunerating Captain Eads for what had then been done by him in the work of improving the South Pass of the Mississippi River; and by section 3 of the same act it was intended to provide for advances to be made to him as the work progressed thereafter. 128.
2. The words "construction" and "prosecution," as used in section 3, have the same meaning. It is sufficient, under that section, to entitle Mr. Eads to payment, if it appears that the materials are actually furnished in such manner that the United States cannot once have the benefit of them in the structure, or that the labor is actually done, or the expenditures actually incurred, in the prosecution of the work, of which the Government can immediately have the benefit. *Ibid.*
3. The phrase in section 3, viz., "to pay for materials furnished, labor done, and expenditures incurred," &c., does not include materials, &c., other than such as are furnished, &c., after June 19, 1878. 129.
4. Materials are "furnished" when they are upon the ground and immediately available for use in the structure. *Ibid.*
5. The words "expenditures incurred" do not mean liabilities incurred; they signify payments or expenditures of money actually made.

SOUTH PASS OF THE MISSISSIPPI, IMPROVEMENT OF—Cont'd.

An expenditure made subsequently to June 19, 1878, in discharge of a liability incurred previously to that date, would not be within section 3. *Ibid.*

6. The word "properly," as employed in the first *proviso* in that section, means actually done in the prosecution of the work by Captain Eads according to his plans; it does not modify the provision in the act of March 3, 1875, chap. 134, that he "shall be untrammelled in the * * * design and construction of said jetties," &c. *Ibid.*
7. Section 3 of the act of June 19, 1878, chap. 313, contemplates that the "materials furnished," payment for which is thereby authorized, shall be free from any lien, claim, or charge thereon after the payment is made. Accordingly when payment is about to be made for such materials thereunder, the officer in charge should be satisfied that they are free from any lien, claim, or charge in favor of third parties, or, if any such lien, claim, or charge exists, that the payment is immediately applied to satisfy the same. 133.
8. The Secretary of War is authorized, under section 3 of the act of June 19, 1878, chap. 313 (the requirements of the statute being complied with), to draw his warrant in favor of James B. Eads to pay for materials furnished, labor done, and expenditures incurred during the month, without regard to other parties claiming to be his assignees. 153.
9. The introduction of the word "assigns" in the acts of March 3, 1875 chap. 134, and June 19, 1879, chap. 313, relating to the work undertaken by Mr. Eads (as, *e. g.*, in the following clauses of the former act: "to pay to said Eads, or to his assigns or legal representatives," "payable to said Eads, his assigns, and legal representatives," "shall be released and paid to said Eads, his assigns, or legal representatives"; and also in the following clauses of the latter act: "in favor of James B. Eads, his assigns, or legal representatives," "in favor of said James B. Eads, his lawful assigns, or legal representatives," &c.), was not intended to withdraw the transfer or assignment of claims arising thereunder from the operation of the general law respecting transfers or assignments of claims against the United States, contained in section 3477 Rev. Stat. *Ibid.*
10. Where the word "assigns" occurs in those acts, it is used in a cognate sense with the words "legal representatives" with which it is associated. It means assignees in law—that is, those upon and in whom the right is devolved and vested by law, such as assignees in bankruptcy. *Ibid.*
11. The "relinquishment of all claims to the deferred payment," required by the third section of said act of June 19, 1878, to be filed with the Secretary of War, need be given by no one except Mr. Eads himself in order to secure to the United States a full and complete discharge of, or a bar to, so much of the claim as is relinquished: *Ibid.*

SOUTH PASS OF THE MISSISSIPPI, IMPROVEMENT OF—Cont'd.

12. Section 3 of the act of June 19, 1878, chap 313, does not authorize disbursements thereunder to pay debts of Mr. Eads contracted previously to the date of the act. 221.
13. By the use of the words "through said jetties," or "through the jetties," in section 9 of the act of March 3, 1879, chap. 181, Congress did not intend to reduce the limit in length of the channel which, under the act of March 3, 1875, chap. 134, it was incumbent upon Mr. Eads to construct between the South Pass and the Gulf of Mexico. Those words refer to the channel embraced in the field of operations at the mouth of the pass, but are not meant to limit the length of the channel to that portion which is included within the walls of the jetties or bounded by either wall. This channel still remains a channel from the South Pass to the Gulf of Mexico. 306.
14. In considering whether the payments contemplated by the act of March 3, 1879, chap. 181, to be made to Mr. Eads upon his obtaining a channel by the action of the jetties of a particular depth and width, should be made, the Secretary of War is not only to consider whether the channel from the South Pass to the Gulf of Mexico complies with the requirements of that act, but also whether the conditions of the statute in other respects have been complied with (as, for example, those requiring a specific depth, by a certain time, through the shoal at the head of the pass). *Ibid.*
15. Though the terms of the *proviso* to section 4 of the act of March 3, 1875, chap. 134, are in the nature of conditions, which must be performed by Mr. Eads before he is entitled to receive the payments provided in other portions of the act when the several depths and widths of channel there specified shall have been obtained, yet if, when demand for any such payment is made, all the conditions *then* required to be performed by him have been performed, he is entitled to the payment, notwithstanding other conditions remain to be complied with by him in the future. 335.
16. The following facts being assumed, viz, that on April 7, 1879, a channel was obtained by Mr. Eads at the mouth of the South Pass, between the deep water of the pass and the deep water of the Gulf of Mexico, 25 feet deep, and not less than 230 feet wide at the bottom, and that a channel existed through the pass including the shoal at its head 22 feet deep and of a navigable width: *Held* that Mr. Eads is entitled to the payment of \$500,000 provided by section 9 of the amendatory act of March 3, 1879, chap. 181, "when a channel shall have been obtained by the action of the jetties, &c., 25 feet in depth, and not less than 200 feet in width at the bottom, through said jetties"; the conditions in the *proviso* aforesaid not requiring that he shall have obtained, up to that time, through the pass and over the shoal, a greater depth than 22 feet, with a navigable width. *Ibid.*

SOUTH PASS OF THE MISSISSIPPI, IMPROVEMENT OF—Cont'd:

17. A "navigable width," as contemplated by said act of March 3, 1875, is a depth sufficiently wide to permit vessels, moved either by sails or steam, to pass each other in the channel formed through the pass and the shoal at its head. 336.
18. Upon consideration of the provisions of the acts of March 3, 1875, chap. 134, June 19, 1878, chap. 313, and March 3, 1879, chap. 181, and assuming that the conditions in the *proviso* to section 4 of the act of 1875 relating to the pass itself and the shoal at its head had been complied with on April 7, 1879, and that on that day a depth of 25 feet with a width of 200 feet had been obtained in the channel between the jetties at the mouth of the pass: *Held* that Mr. Eads is entitled to the payment of \$500,000 under section 9 of the act of 1879, notwithstanding that the width of the channel has since been diminished. 345.
19. The provisions of the act of March 3, 1875, chap. 134, and of the amendatory acts of June 19, 1878, chap. 313, and March 3, 1879, chap. 181, in so far as they relate to the payments to Mr. Eads, restated; and *held* that (upon the assumption that he has obtained a channel of 26 feet in depth and 200 feet in width from the deep water of the South Pass to the deep water of the Gulf of Mexico, including the requisite depth through the pass and over the shoal at its head, and has complied in all other respects with his contract) he is entitled to receive the sum of \$500,000, under the provisions of the said act of March 3, 1879. 362.
20. Whether or not the use of dredge-boats is appropriate and allowable as an "auxiliary" for the maintenance of the channel through the jetties at the South Pass of the Mississippi is a matter for the Secretary of War to determine upon the information and opinion of the officers of the Engineer Corps. 392.
21. The words "quarterly" and "annual" in the act of March 3, 1875, chap. 134, in their application to the payments to Mr. Eads for maintenance of the channel (after its completion) through the South Pass, have reference to the time during which the completed channel is maintained, excluding from the computation of such time all periods of failure to maintain the channel. *Ibid.*
22. Accordingly, where a quarter (three calendar months), commencing from and after the completion of the channel, had expired on October 9, 1879, during which period the channel was maintained as required by the statute, with the exception of twenty days of failure: *Held* that the quarterly payment provided for by said act was not demandable until October 29, 1879; when (if in the mean time the channel was maintained, but not otherwise) such payment became due. *Ibid.*
23. Capt. James B. Eads is not entitled to interest on the one million dollars retained by the United States (under the provisions of the act of March 3, 1875, chap. 134) as security for the maintenance of the completed channel of the required width and depth through the South Pass of the Mississippi, for any period of time

SOUTH PASS OF THE MISSISSIPPI, IMPROVEMENT OF—Cont'd.

occurring after the completion of the channel during which he has failed to maintain the channel. Every such period of failure must be excluded in computing the annual interest payable on said million dollars, just as the same is to be excluded from the quarterly or annual payments provided for. 420.

SPECIFIC DISABILITY.

See PENSION, 4, 5.

STATE, WAR, AND NAVY DEPARTMENT BUILDING.

See PUBLIC BUILDINGS, 2.

STATE WAR CLAIMS.

1. The limitation prescribed by section 3489 Rev. Stat., for auditing and paying certain claims against the United States, does not apply to war claims in behalf of States for which provision was made by the act of July 27, 1861, chap. 21. 284.
2. The words in that section, "for collecting, drilling, or organizing volunteers," must be understood, in view of the construction which they had received in previous legislation, as meant to be descriptive of and as applying to that class of war claims only which had theretofore been provided for by the acts of August 5, 1861, chap. 51; July 5, 1862, chap. 133; February 9, 1863, chap. 25; and June 15, 1864, chap. 124; the provisions of these acts, to which reference is made, being construed to cover claims of individuals, and not those of States, for the subjects therein designated. *Ibid.*
3. The act of July 12, 1870, chap. 251, section 4, which repealed the appropriation (indefinite in amount) made by the aforesaid act of July 27, 1861, contemplated that the duty of auditing the claims of States presented under the last-mentioned act should continue to be performed by the accounting officers, and that in future Congress would provide for their payment by appropriations based upon estimates submitted. *Ibid.*
4. It is the duty of the administrative officers of the War Department and the accounting officers of the Treasury Department to proceed with the examination and auditing of these claims, that proper estimates may be submitted to Congress therefor. *Ibid.*
See CLAIMS, 22.

STATUTES, INTERPRETATION OF.

1. The interpretation placed upon section 3 of the act of March 2, 1867, by Attorney-General Williams, in 14 Opin., 192, 358—viz, that it was designed to give the transferred officers the full benefit of their former sea-service, in so far as it might go to complete the period of such service required in their respective grades previous to nomination for promotion, and in so far as it ought properly to be taken into account in the matter of assign-

STATUTES, INTERPRETATION OF—Continued.

- ment to duty, and that it conferred no advantages beyond these—approved and adopted. 45.
2. Legislation is to be deemed to be prospective only, unless language be used leading, either directly or by fair inference, to the conclusion that it is to have a retrospective operation. 378.
 3. The words "contingent expenses," as used in the appropriation acts, mean such incidental, casual expenses as are necessary or appropriate and convenient, in order to the performance of duties required by law of the Department or the office for which the appropriation is made. 412.
- See ACCOUNTS AND ACCOUNTING OFFICERS, 1, 2; ADVERTISEMENTS; APPOINTMENT, 2, 4, 5, 7, 9, 10; APPROPRIATIONS, 1, 3; ARMY, 1, 5, 6, 7, 8, 11, 12, 13, 14, 17, 19, 20, 22; ASSIGNMENT; BANKS AND BANKING; CESSION OF JURISDICTION; CLAIMS, 1, 3, 11, 16, 17, 18; COMPENSATION, 10, 11; COMPROMISE, 1, 3, 5, 6; COURT-MARTIAL, 6, 17; CUSTOMS LAWS, 1, 3, 4, 5, 15, 19, 20, 21, 23, 24, 25, 29; DEPARTMENTAL PRINTING AND BINDING; DESERTING SEAMEN, RESTORATION OF; DISTRICT OF COLUMBIA; EIGHT-HOUR LAW; ENROLLMENT AND LICENSE OF VESSELS, 1, 3; FORFEITURE, 2; FORT SNELLING, BRIDGE AT; FRANKING PRIVILEGE; IMPROVEMENT OF NAVIGABLE WATERS, 4; INDIANS AND INDIAN LANDS, 9, 10; INTERNAL REVENUE, 5, 6, 7, 8, 11, 15, 16, 17; LAND, ACQUISITION OF, 1, 3; LANDS ACQUIRED IN SATISFACTION OF JUDGMENTS, 3, 4; LANDS, PUBLIC, 1, 7, 9, 10, 18, 19, 20, 21, 23, 24, 25, 26, 29; LOUISVILLE AND PORTLAND CANAL; NAVAL ACADEMY, 4; NAVY, 2, 6, 10, 11; OFFICIAL ENVELOPE; PENSION, 1, 4, 9, 11; POSTAL LAWS; POSTMASTER-GENERAL; QUARTERS, COMMUTATION FOR; SECRETARY OF THE TREASURY; SECRETARY OF WAR; SOUTH PASS OF THE MISSISSIPPI, IMPROVEMENT OF; STATE WAR CLAIMS; SUBSIDIARY SILVER COINS; TERRITORIES; THREE MONTHS' EXTRA PAY; TIMBER ON PUBLIC LANDS, CUTTING OR REMOVAL OF; TRANSPORTATION, ARMY, 3, 4, 5; TREATIES WITH FOREIGN GOVERNMENTS, 5; UNION PACIFIC RAILROAD COMPANY; VESSEL, 2; WAR DEPARTMENT; WEST POINT, RIGHT OF WAY OVER GOVERNMENT LAND AT; WRECK.

STOPPAGE OF PAY.

1. The amount of the reward paid for the apprehension of a deserter, who upon trial by a court-martial for desertion has been convicted only of the offense of absence without leave, cannot lawfully be stopped against his pay in a case where the sentence of the court does not impose such stoppage. 474.
2. Under paragraph 160, Army Regulations, to warrant the stoppage there must be either a conviction of the offense of *desertion* or a restoration to duty without trial on conditions involving the stoppage. A conviction of the offense of *absence without leave* is not sufficient. 475.
3. Stoppage of pay against a soldier is unauthorized unless made in

STOPPAGE OF PAY—Continued.

execution of the sentence of a court-martial, or in pursuance of a statute, or in conformity to the Regulations of the Army, which have the force of law. *Ibid.*

SUBSIDIARY SILVER COINS.

1. Section 3586 Rev. Stat. makes the subsidiary silver coins of the United States legal tender at their nominal value only where the *amount of the debt*, in payment of which they are offered, does not exceed five dollars. 138.
2. The provision applies alike to cases wherein the officers of the Government are receiving payment of its dues and to cases wherein they are disbursing the public funds in discharge of its obligations. 139.

SURETY.

See POSTAL LAWS, 3, 4.

SUSPENSION.

See NAVY, 11, 12, 13; REVENUE MARINE SERVICE, 1.

TELEGRAPH.

See POSTMASTER-GENERAL.

TEMPORARY APPOINTMENT.

See APPOINTMENT, 3, 4, 5, 6, 8, 9; COMPENSATION, 16.

TENURE OF OFFICE.

The term of a postmaster who is appointed by the President does not expire upon the reduction of his office by decrease of salary to one of the fourth class (vacancies in offices of which class are filled by appointment by the Postmaster-General). Such postmaster is entitled to remain in the office during the term for which he was appointed, unless sooner removed according to law. 18.

See APPOINTMENT, 2, 4, 5; REVENUE MARINE SERVICE, 1.

TERM OF OFFICE, WHEN IT BEGINS.

See APPOINTMENT, 11.

TERRITORIES.

1. Corporations formed under a general law of the Territory of Montana, dated December 13, 1867, for the purpose of constructing and maintaining bridges, roads, and ferries, come within the scope of the provision in the first section of the act of March 2, 1867, chap. 150, authorizing the Territorial legislatures, by general incorporation acts, to permit persons to associate themselves together as bodies corporate for "industrial pursuits." 114.
2. In granting to such corporations the privilege of locating their bridges, roads, &c., upon the public lands of the United States,

TERRITORIES—Continued.

- the Territory must be deemed to have acted within the limits of the authority thus given by Congress. *Ibid.*
3. Where the bridges, roads, &c., so located are used by the Government for the passage of troops, animals, and supplies, the owners thereof are entitled to a reasonable compensation for such use. The compensation is not necessarily to be the tolls fixed by the owners or the local authorities. *Ibid.*
 4. The President has no authority, by virtue of section 2132 Rev. Stat., to prohibit the introduction of molasses into the Territory of Alaska (the article being used there for manufacturing distilled spirits for sale among the natives) when in his judgment the public interest seems to require that he should do so. In this matter that Territory cannot be considered as a country belonging to an Indian tribe. 141.
 5. The legislature of Wyoming Territory has no power to direct that persons convicted of violations of the laws thereof shall be imprisoned at any place outside of the boundaries of that Territory. 678.

See POST-TRADER, 1.

THREE MONTHS' EXTRA PAY.

1. The three months' extra pay provided by section 5 of the act of July 19, 1848, chap. 104, is a gratuity, the right to which, on the death of the officer or soldier without receiving the same, does not survive as part of his estate. The widow, children, parents, or brothers and sisters of the deceased officer or soldier do not become entitled thereto *jure representationis*, or in the quality of legal successors to his estate, but solely by force of their designation in the statute. 408.
2. *Held*, accordingly, that the Soldiers' Home, in the District of Columbia, has no right under section 4818 Rev. Stat. to receive, as "moneys belonging to the estates of deceased soldiers," the amounts to which their widows, children, &c., are entitled by virtue of the provisions of the fifth section of said act of 1848, and which "are or may be unclaimed for the period of three years subsequent to the death of such soldiers." *Ibid.*
3. Upon the same grounds and considerations on which the foregoing ruling proceeds: *Held*, also, that the Soldiers' Home derives no right under section 4818 Rev. Stat. to receive the extra pay provided by the act of February 19, 1879, chap. 90, where the same remains unclaimed as aforesaid by the widows, children, &c., of deceased soldiers who were entitled thereto. 409.

TIMBER ON PUBLIC LANDS, CUTTING OR REMOVAL OF.

Sections 4 and 5 of the act of June 3, 1878, chap. 151, entitled "An act for the sale of timber lands in the States of California, Oregon, Nevada, and in Washington Territory," construed in connection with section 2461 Rev. Stat., punishing the cutting or removal of timber growing on the public lands. 129.

TITLE, GRADE, AND RANK.

See NAVY, 8.

TOBACCO AND CIGARS, SALE OF, AT RETAIL.

See INTERNAL REVENUE, 4.

TONNAGE DUTY.

See SECRETARY OF THE TREASURY, 2; TREATIES WITH FOREIGN GOVERNMENTS, 1, 3, 5.

TRADE-MARKS.

The provisions of the act of July 8, 1870, chap. 23J (embodied in section 4937 Rev. Stat.), in regard to trade-marks, having been declared unconstitutional by the United States Supreme Court, it is no longer the duty of the officer charged therewith to execute them. Accordingly, it is recommended that the practice of registering trade-marks at the Patent Office (which was allowed to be done by parties desiring it since the ruling of the Supreme Court above referred to) be discontinued. 586.

TRANSPORTATION, ARMY.

1. The Union Pacific Railroad Company cannot require that flour, in order to be transported over its road for the United States, shall be packed in barrels, and refuse to transport it if packed in sacks. 581.
2. Whether the Kansas Pacific Railway Company can decline to transport over its road, for the United States, flour in sacks at ordinary freight rates, or require the same to be transported at owner's risk when the Government pays only the lowest rate therefor, considered. *Ibid.*
3. In March, 1877, the Northern Pacific Railroad Company entered into a contract with the Quartermaster's Department to transport Army supplies, at a stated rate per 100 pounds, between certain points in the State of Minnesota, in performing which the company was obliged to transport the stores part of the way over a land-grant railroad. In the contract was a stipulation that no deduction should be made from the rate stated "on account of land grants." *Held* that the contract is within the act of March 3, 1875, chap. 133, and that the accounting officers of the Treasury have no authority to audit and settle a claim for transportation thereunder, but such claim is required to be settled by suit in the Court of Claims. 607.
4. The prohibition in the act of 1875 is not limited to payments to the company owning the land-grant road over which the transportation was performed. It extends to payments made to any railroad company for transportation over any land-grant road of the sort specified, whether its own or another's. *Ibid.*
5. The act of 1875 does not take away the authority of the accounting officers of the Treasury to audit and settle accounts for transportation arising under *bona fide* contracts made with common

TRANSPORTATION, ARMY—Continued.

carriers other than railroad companies, in cases where such transportation has been partly performed over land-grant roads. *Ibid.*
See COMPENSATION, 13, 14.

TRANSPORTATION IN BOND.

See CUSTOMS LAWS, 23, 24.

TREATIES WITH FOREIGN GOVERNMENTS.

1. Under article 30 of the Treaty of Washington, of May 8, 1871, and article 19 of the regulations made under the first-mentioned article to carry its provisions into execution, it is lawful to transport goods by means of British or American vessels from the ports of Chicago or Milwaukee to points in Canada, thence through Canadian territory by rail, and from the termini of the lines of railway by either British or American vessels to the ports of Oswego and Ogdensburg. 42.
2. The above-named ports are "ports on the northern frontier of the United States" within the meaning of said regulations. *Ibid.*
3. The tonnage tax collected from the steamer Smidt in the years 1868, 1869, 1870, and 1872 (it having arrived at the port of New York from Bremen four times in the year 1868, five times in 1869, twice in 1870, and four times in 1872), was exacted in contravention of the treaty of December 20, 1837, between the United States and the Hanseatic Towns; the ninth article of which treaty (containing the most favored clause), when read in connection with the fourth article of the treaty of July 17, 1858, between the United States and Belgium, providing that steam vessels of the United States and the Hanseatic Towns in *regular* navigation between the United States and the Hanseatic Towns shall be exempt in both countries from the payment of duties of tonnage, &c. 275.
4. The word "regular" in that provision is used in contradistinction to *occasional*; it refers to steam vessels which, alone or with others, constitute *lines*, and not to such as are regular in the sense of being properly documented. 276.
5. The act of June 19, 1873, chap. 318, does not authorize an allowance of interest on the amount of the tonnage tax unlawfully exacted. *Ibid.*
6. The provision in article 21 of the treaty of Washington, of May 8, 1871, that "fish-oil * * * being the produce of the fisheries of the United States, or of the Dominion of Canada, or of Prince Edward's Island, shall be admitted into each country, respectively, free of duty," does not include cod-liver oil which has been purified and refined for medicinal purposes, whether it is put up in barrels or other kind of package. Such cod-liver oil is dutiable. 601.
7. The exaction of tonnage duty, under section 15 of the act of July 14, 1862, chap. 163, upon Hanseatic vessels is not in contraven-

TREATIES WITH FOREIGN GOVERNMENTS—Continued.

tion of treaty obligations arising out of the treaty between the United States and the Hanseatic Republics of December 20, 1827. 626.

See DESERTING SEAMEN, RESTORATION OF; EXTRADITION.

TREATIES WITH INDIANS.

See CREEK ORPHAN FUND, 1, 3; INDIANS AND INDIAN LANDS, 5, 7, 8; LANDS, PUBLIC, 18, 19, 20.

TWENTY PER CENT. ADDITIONAL DUTY.

See CUSTOMS LAWS, 2, 29.

UNION PACIFIC RAILROAD COMPANY.

Interest on the bonds issued by the Union Pacific Railroad Company under the act of February 24, 1871, chap. 67, commonly known as the "Omaha bridge bonds," is not to be deducted from the gross earnings of that company in ascertaining its net earnings. 240.

See TRANSPORTATION, 1.

VESSEL.

1. A foreign-built vessel, wholly owned by citizens of the United States, and having no foreign registry, is entitled by virtue of her American ownership to carry the American flag and to the protection of the American Government. 533.
2. By act of May 2, 1878, chap. 80, an American register or enrollment was authorized to be issued to the Canadian-built propeller *East* by the name of the *Kent*. The vessel was dismantled as a *steamer*, and subsequently enrolled under that act as a *barge*. Afterwards the machinery was replaced in *lieu*; but the inspectors of steamboats declined to give her a certificate of inspection—the boiler not being constructed of *stamped* iron, as required by section 4428 Rev. Stat. *Held* that the act of 1878 was executed by the enrollment of the vessel as a *barge*; and that the boiler, being then no part of the vessel, was not nationalized under that act, nor entitled to pass inspection without being stamped. 680.

See NAVIGATION; OFFENSE AGAINST FOREIGN GOVERNMENTS.

WABASH AND MIAMI CANAL.

See LANDS, PUBLIC, 10, 11, 12, 13, 14.

WAR DEPARTMENT.

1. Section 3 of the act of June 23, 1879, chap. 35, which provides that "the examiner of State claims in the office of the Secretary of War shall have, while on such duty, the pay, emoluments, and allowances of mounted officers one grade higher than that held by him in his regiment or corps," is prospective in its operation, and has no retrospective effect. It entitles the officer described to the pay, &c., therein provided while thereafter performing

WAR DEPARTMENT—Continued.

- such duty; but does not entitle him thereto for duty performed prior to the date of the act. 378.
- 2. The contingent fund of the War Department cannot be applied to meet the expense attending the employment of a detective to discover and furnish evidence necessary to convict the parties concerned in setting fire to certain buildings which were rented for the Quartermaster's Department at Atlanta, Ga. 412.

WESTERN AND ATLANTIC RAILROAD OF GEORGIA.

See SECRETARY OF WAR, 5.

WEST POINT, RIGHT OF WAY OVER GOVERNMENT LAND AT.

- 1. The privilege conferred by the act of December 14, 1867, chap. 1, upon the Hudson River West Shore Railroad Company "to locate, construct, and operate its railroad on the shore line across the property belonging to the Government at West Point, in the State of New York," &c., became a franchise of that corporation assignable to any other company succeeding to its rights and franchises. Hence the North River Railway Company, having succeeded by transfer to the franchises, &c., of the first-named company, is entitled to the privilege mentioned. 519.
- 2. The Secretary of War cannot "materially" alter the location fixed by his predecessor in office and accepted by the railroad company. *Ibid.*
- 3. The regulations adopted and approved by the Secretary of War, under the act of 1867 aforesaid, contemplated that changes therein might be made as future contingencies should require. The proposed series of regulations of June, 1880, may be adopted if it is deemed needful to do so, having due regard to the interests of the company. *Ibid.*
- 4. The Secretary of War may properly require the removal and rebuilding of the observatory, made necessary by the location of the railroad, to be done at the expense of the railroad company, as a condition of the use of such location; and, to assure the performance of that work by the company, he can accept security therefrom in the form of a deposit of a sufficient sum of money with a United States depository, to be returned on completion of the work. 520.
- 5. The privilege granted by the said act of 1867 cannot be deemed forfeited by lapse of time, in the absence of a judicial proceeding declaring the forfeiture. *Ibid.*

WIDOW PENSIONER.

See PENSION, 11.

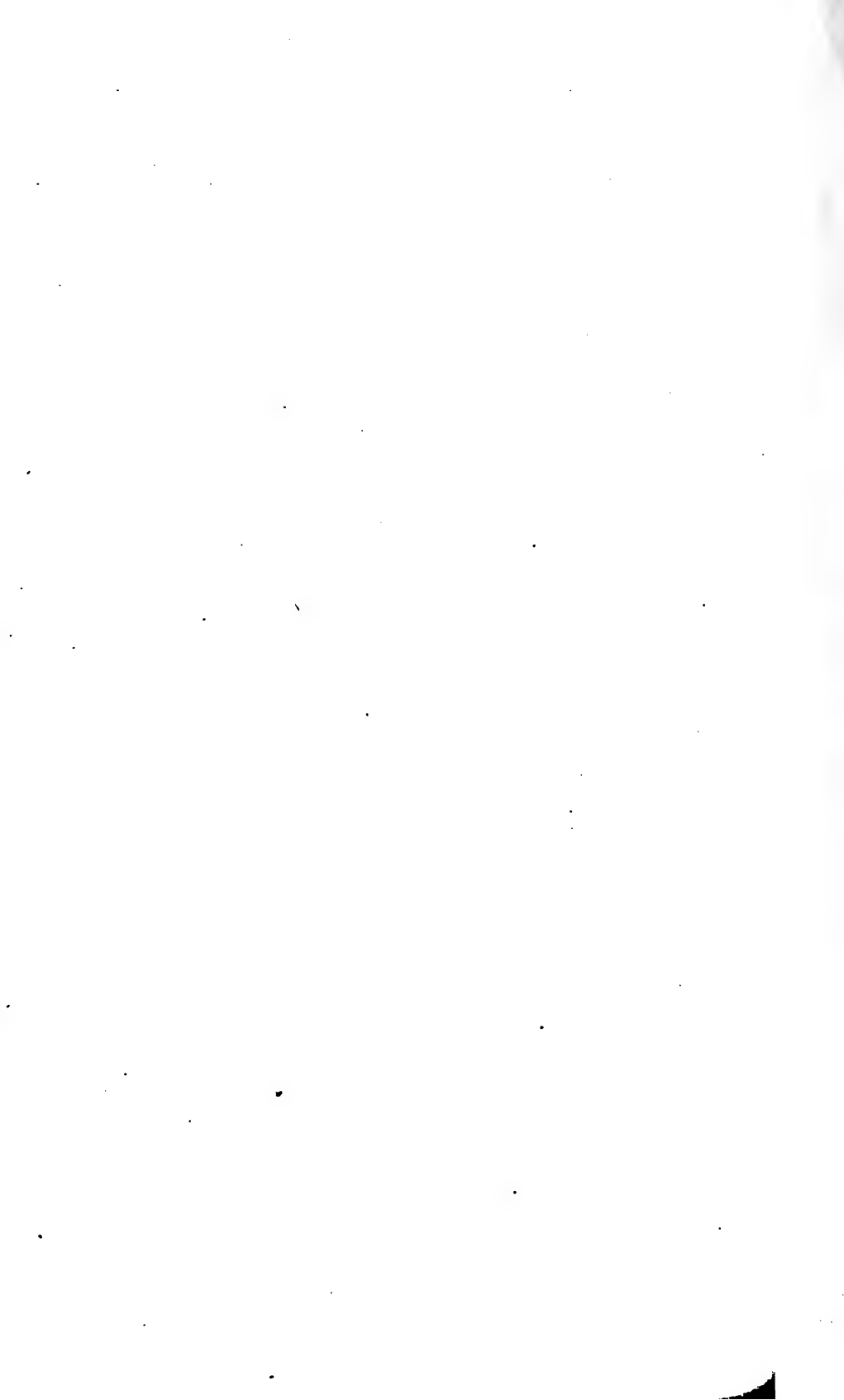
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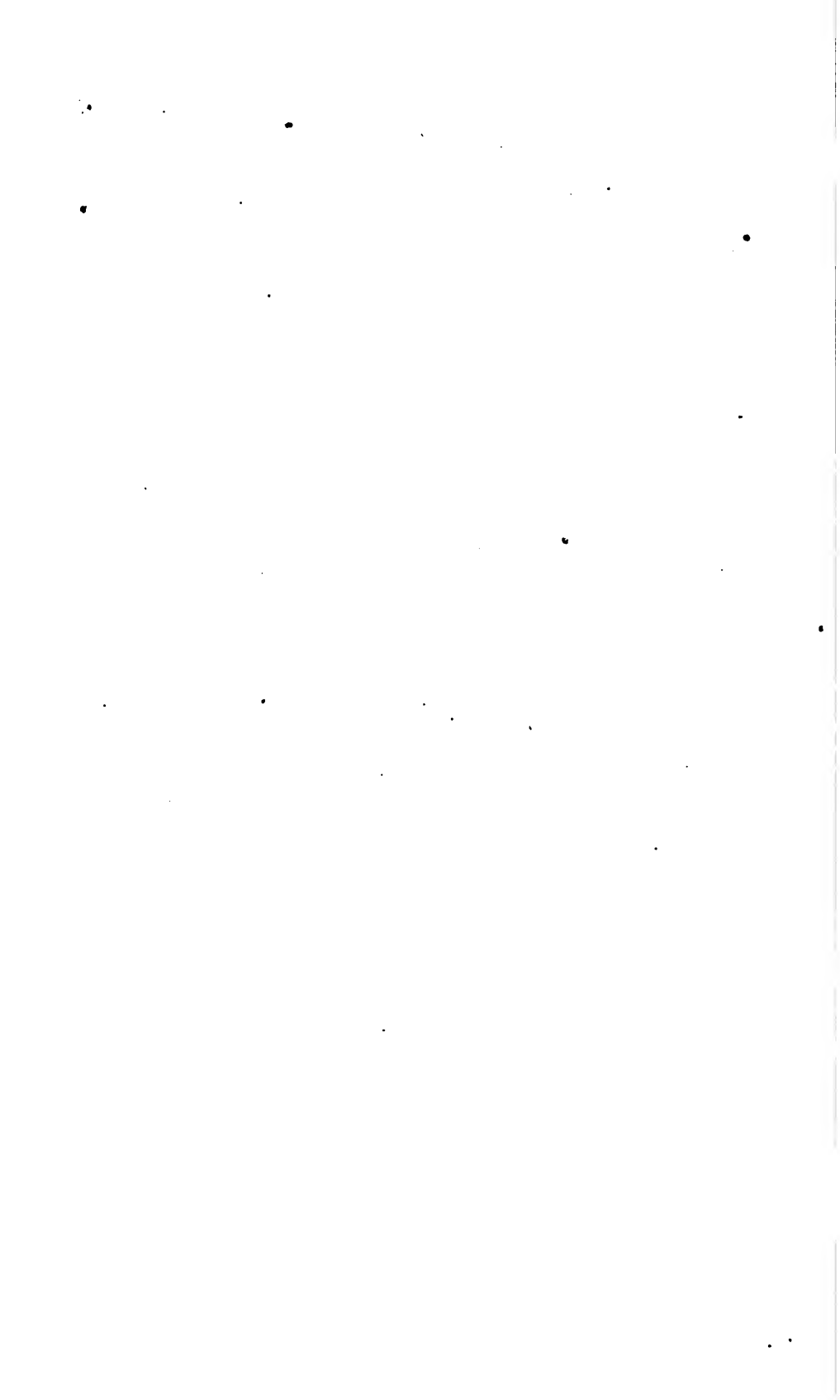
See COMPENSATION, 8, 9.

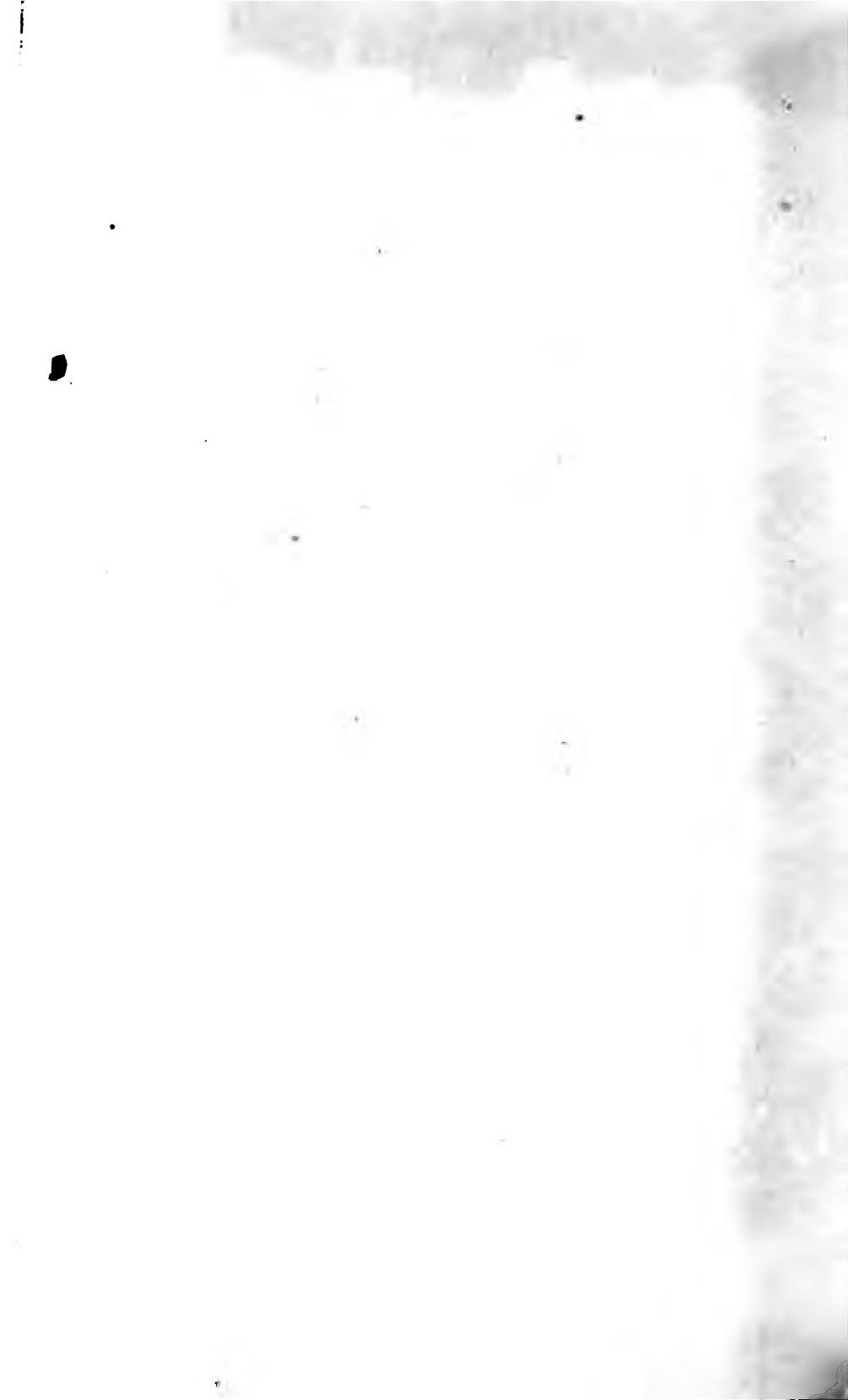
WRECK.

The commissioners of wrecks appointed under the laws of the State of North Carolina are "parties legally authorized to receive" property saved from shipwreck on the coast of that State, within the meaning of the proviso to section 4 of the act of June 18, 1878, chap. 265. It is accordingly the duty of keepers of life-saving stations within the limits of that State, under the provisions of that section, to deliver such property to the said commissioners whenever it is claimed by them. 645.

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